Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MILLICENT CLESI BRODTMANN, WIFE OF EDWOOD S. BRODTMANN, ET AL.
Petitioners,

versus

CLAUDE V. DUKE AND KREMER MARINE, INC., ONAN CORPORATION AND CUMMINS ENGINE CO.
Respondents

On Petition for a Writ of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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77 pp

QUESTION PRESENTED FOR REVIEW

Are Punitive Damages Available To Non-Seamen Under the General Maritime Law As A Matter Of Law?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Millicent Clesi Brodtmann, Edwood S. Brodtmann, Jr., Richard Brodtmann and Lisa Brodtmann Bruno, pray that a writ of certiorari issue to review the judgment and opinion of the Louisiana Supreme Court entered on April 24, 1998.

CITATIONS TO THE COURTS BELOW

The Brodtmanns filed their petition for wrongful death and for punitive damages on October 8, 1990. The issue regarding punitive damages was briefed in pre-trial memoranda, post-trial memoranda and a Motion for New Trial filed with the trial court. The order of the district court dated May 2, 1995 is reproduced in the Appendix. The issue was addressed on appeal to the intermediate Louisiana appellate court. The opinion of the Louisiana Fourth Circuit Court of Appeals was rendered on February 11, 1998 and is reproduced in the Appendix. The issue was addressed when the plaintiffs sought discretionary review of the issue before the Louisiana Supreme Court. The Louisiana Supreme Court's denial of the Writ of Certiorari or discretionary review was rendered on April 24, 1998 and is reproduced in the Appendix. This issue has been properly raised below and is ripe for this Court's review.

STATEMENT OF BASIS FOR JURISDICTION

The judgment of the Louisiana Fourth Circuit Court of Appeals was entered on February 11, 1998. The Brodtmanns' Writ of Certiorari to the Louisiana Supreme Court was denied on April 24, 1998. This Honorable Court has jurisdiction under 28 U.S.C. § 1333, et seq. Petitioners timely filed their petition for Writ of Certiorari on July 21, 1998.

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C.A. § 1333 et seq; Admiralty. This case falls under the General Maritime Law.

STATEMENT OF THE CASE

A. Procedural History

The issue of the recoverability of punitive damages by a non-seaman under the general maritime law was presented to the lower courts at all stages of the proceeding. The Brodtmanns filed their petition for wrongful death and for punitive damages on October 8, 1990. This issue was briefed in pre-trial memoranda, post-trial memoranda and a Motion for New Trial filed with the trial court. The judgment of the district court dated May 2, 1995 is reproduced in the Appendix. The issue was addressed on appeal to the intermediate Louisiana appellate court. The opinion of the Louisiana Fourth Circuit Court of Appeals is reported at 708 So.2d 447 (La. App. 4th Cir. 1998) and is reproduced in the Appendix. The issue was addressed when the plaintiffs sought discretionary review of the issue before the Louisiana Supreme Court. The Louisiana Supreme Court's denial of the Writ of Certiorari or discretionary review was rendered on April 24, 1998 and is reproduced in the Appendix. Copies of the Petition, the pretrial memoranda, post-trial memoranda, the intermediate appellate briefs and the petitions for discretionary review with the Louisiana Supreme Court are included in the Appendix. This issue has been properly raised below and is ripe for this Court's review.

The facts before the lower court clearly warranted the imposition of punitive damages. The defective product in this case was an Onan MCCK galvanized steel exhaust pipe nipple. This nipple connected the Onan MCCK generator manifold and the exhaust elbow assembly. Over a twenty year period, this MCCK galvanized steel exhaust pipe nipple consistently and repeatedly corroded from the inside out and failed, resulting in at least nine deaths and nine serious injuries, that we know of, out of just 16,000 MCCK generators produced. Onan was repeatedly placed on notice of the deadly problem but did nothing but conceal the problem from the remaining MCCK end users.

Onan knew that the MCCK galvanized steel exhaust pipe nipple was a perishable part. Onan was also fully aware that stainless steel was a better suited material for this application. Nonetheless, in 1966, Onan intentionally chose to use a galvanized steel exhaust pipe nipple instead of stainless steel, for a savings-per-unit of less than one dollar. Over the next twenty years, the MCCK galvanized steel exhaust pipe nipple repeatedly corroded and failed, emitting carbon monoxide, resulting in multiple serious injuries and multiple deaths by carbon monoxide asphyxiation.

Throughout the past 25 years, Onan acquired knowledge that the galvanized steel exhaust pipe nipple was repeatedly corroding and failing, killing and injuring people. Yet, Onan did not warn MCCK users of this problem. Onan never corrected the problem presented to the MCCK end users by the MCCK galvanized steel exhaust pipe nipple. While in 1984 Onan did change the material composition of the exhaust pipe nipple from galvanized steel to stainless steel on new MCCK generators produced after 1984, Onan never warned the users of the 16,000 MCCK units already in the stream of commerce of the clear and present danger.

B. Facts

In October of 1989, defendant, Mr. Claude Duke, age 84 (now deceased), a retired New Orleans attorney, and a resident of Lakeshore, Mississippi, was contacted by his friend, Mr. Claude Hogan, age 67, a retired building contractor, formerly of New Orleans, also a resident of Mississippi, to arrange an overnight fishing trip aboard Mr. Duke's thirty-seven foot Eggharbor cabin cruiser named the M/V "PEGGY D". Mr. Duke purchased the M/V "PEGGY D" in 1968. At the time of the purchase, installed and in place aboard the M/V "PEGGY D" was an Onan MCCK marine gasoline generator manufactured by defendant, Onan Corporation (Onan), which remained installed and in place aboard the M/V "PEGGY D" until the date of the incident.

It was arranged by Mr. Hogan and Mr. Duke that they, along with Mr. Edwood S. Brodtmann, age 64, a retired industrial machine salesman, originally from New Orleans, and Mr. Louis Dehon, age 67, a retired executive at Cooper/T. Smith, originally from New Orleans, both residents of Mississippi, would leave Bayou Caddy, located in Lakeshore, Mississippi, on October 9, 1989, aboard the M/V "PEGGY D", with smaller fishing boats in tow, for an overnight fishing trip in the marshes of St. Bernard Parish, State of Louisiana. However, due to high winds and poor fishing conditions, the excursion by Mr. Duke and his friends did not begin until the next day.

On the morning of October 10, 1989, Mr. Duke, Mr. Brodtmann, Mr. Hogan, and Mr. Dehon left Bayou Caddy aboard the M/V "PEGGY D" with three smaller fishing boats in tow, and headed south across the Mississippi Sound into Louisiana territorial waters. At about 10:00 a.m., they ultimately anchored in Johnson Bay, a navigable waterway near Picnic Bayou, in the Parish of St. Bernard, State of Louisiana. At that time, the men exited the M/V "PEGGY D" into the smaller boats to fish the surrounding marshes of St. Bernard Parish. Before they departed, the Onan MCCK generator was activated to power the air conditioner in order to cool the cabin. Sometime thereafter during the evening of October 10, 1989, Mr. Brodtmann, Mr. Hogan and Mr. Dehon died as a result of carbon monoxide poisoning. At the time of his death, it appeared that Mr. Brodtmann was cooking.

The next morning, Mr. Duke awoke at about 7:30 a.m. and immediately attempted to wake up his friends to no avail. He shook Mr. Dehon, but Mr. Dehon did not respond. He looked down into the forward cabin and saw Mr. Hogan laying down and Mr. Brodtmann kneeling in front of the stove with his face down on a seat near the stove. Mr. Duke yelled to wake them. They did not move. They were dead.

Mr. Duke, hysterical over the sudden change of events, attempted to contact someone on the radio. He was unsuccess-

ful. Finally, a fishing vessel, "THE MANIAC", was flagged down by Mr. Duke at about 12:00 p.m. on October 11, 1989. The Coast Guard was notified as was the St. Bernard Parish Sheriff's office.

The incident investigation revealed that the galvanized steel exhaust pipe nipple which connected the MCCK generator and exhaust elbow assembly had ultimately failed, resulting in the emission of deadly exhaust fumes (carbon monoxide) into the cabin of the vessel. It was determined that the MCCK galvanized steel exhaust pipe nipple corroded from the inside out and that there was only surface rust on the exterior of the nipple. Autopsies of Mr. Brodtmann, Mr. Hogan, and Mr. Dehon, conducted by Dr. Gerald Liuzza, a forensic pathologist, revealed that all three men died as a result of carbon monoxide asphyxiation.

C. Background

This tragic story began at Onan Corporation in 1966 with the negligent material selection for the galvanized steel exhaust pipe nipple which connected the Onan MCCK generator manifold and Onan exhaust elbow assembly. This application was a design defect under pertinent products liability law. Onan negligently chose to use galvanized steel in the exhaust pipe nipple application. The following facts have been established from testimony and documents generated by Onan, its employees and agents.

The MCCK galvanized steel exhaust pipe nipple was a perishable part and Onan knew it. As far back as 1965-66, Onan also knew that stainless steel was the material of choice for this application. This design defect, coupled with Onan's decision not to warn the MCCK end users of the design defect despite admitted knowledge of the defective design, is responsible for nine deaths and nine hypoxic injuries, that we know of out, of just sixteen thousand units produced. Although a recall was feasible, and Onan continuously attempted to, and finally did

design out the defect on new MCCK units produced, at no point did Onan address the problem and warn the remaining MCCK end users of their potential peril. Owners, operators and end users of MCCK generators with the defective galvanized steel exhaust pipe nipples are still at risk today.

In 1966 Onan Corporation chose to use a galvanized steel exhaust nipple, Part No. 505-624, to connect the MCCK generator manifold and exhaust elbow assembly. At that time the price of a one inch galvanized steel exhaust pipe nipple was $.07; a brass pipe nipple was $.35; and a stainless steel pipe nipple was $.99. Onan knew that carbon steel alone was a poor material selection for the interior of the nipple because there would be nothing to protect it from corroding or to reduce the rate of corrosion. Onan knew that the galvanized steel exhaust pipe nipple would corrode and seize up after a time in use. Onan used galvanized steel despite its knowledge that galvanized steel was not the proper material. The only reason for this use of galvanized steel was a reduction in cost.

Onan knew or should have known, and later indisputably learned, that the use of galvanized steel in this high temperature, dry exhaust application exposed to water and other corrosive elements, would inevitably lead to inordinate corrosion and deterioration of the MCCK galvanized steel exhaust pipe nipple from the inside out. The interior of this galvanized steel exhaust pipe nipple was exposed to exhaust gases which are extremely corrosive and hot. These hot, corrosive gases pass through the interior of the nipple at high velocities, further exacerbating their corrosive effect. The interior of this galvanized steel exhaust pipe nipple is also exposed to water. At temperatures of about 500° the zinc which makes up the galvanized coating begins to flake, while at temperatures of 787° the zinc melts. According to Onan, the temperature of the exhaust gases running through the galvanized steel exhaust pipe nipple was between 800° and 1,300° Fahrenheit. Once the zinc coating was

burned away or eliminated, there is nothing to protect the remaining carbon steel from accumulating condensation which caused further corrosion and oxidation. The result is an accelerated corrosion rate to the interior of the galvanized steel pipe nipple. The selection of the galvanized steel as opposed to stainless steel for the MCCK exhaust pipe nipple was due to cost. Using galvanized steel in this MCCK application was a defect in design for which Onan was found liable.

Despite the wealth of information available to Onan at the time it negligently chose to use galvanized steel as the material to be applied in the MCCK exhaust pipe nipple application, Onan failed to warn the MCCK end users that the galvanized steel exhaust pipe nipple would not last as long as other component parts of the MCCK generator. Onan did not warn MCCK end users of the limited life of the galvanized steel exhaust pipe nipple used in this high temperature, dry exhaust application exposed to water and other corrosives. Onan did not warn because, in Onan's opinion, the galvanized steel exhaust pipe nipple would last as long as the other component parts of the generator. Onan's failure to warn MCCK end users that the galvanized steel pipe nipple would corrode and fail, resulting in serious injury or death, rendered the MCCK galvanized steel exhaust pipe nipple, applied in this high temperature, dry exhaust application exposed to water, defective.

The defective design of the MCCK generator using galvanized steel in this exhaust pipe nipple application was confirmed by a series of MCCK galvanized steel exhaust pipe nipple corrosion failures which resulted in multiple injuries and deaths. In fact, six MCCK galvanized steel exhaust pipe nipples, that we know of, corroded from the inside out and failed resulting in serious injury and death prior to the time Mr. Duke's MCCK generator left Onan's control. Yet, Onan did not correct the design problem and did not warn the users of the MCCK generators. The facts regarding these repeated failures are supported by evidence generated by Onan, its employees and agents.

KISSELMAN (1973)

Onan repeatedly acquired knowledge that the MCCK galvanized steel exhaust pipe nipple would and did corrode from the inside out, fail, and emit carbon monoxide, resulting in serious personal injury and death. The first problem that Onan acknowledged concerning the MCCK galvanized steel exhaust pipe nipple occurred in 1973, when a galvanized steel exhaust pipe nipple which connected the Onan MCCK generator manifold and Onan exhaust elbow assembly corroded from the inside out and failed.

On March 24, 1973, in a navigable waterway on Kentucky Lake, in Marshall County, Kentucky, a vessel known as the "SHANGRI LA III", owned and operated by Harry Kisselman, Jr. (Harry, Jr.), was anchored for the evening. Installed and operating aboard the "SHANGRI LA III" was an Onan MCCK generator. On board the "SHANGRI LA III" were Harry Kisselman, Jr., age 44; Harry Kisselman, III (Bud), age 25; Jerry Kisselman (Jerry), age 21; and Jerry's friend, Donald Buchanan (Buchanan), age 21.

The galvanized steel exhaust pipe nipple which connected the MCCK generator and Onan exhaust elbow assembly corroded and failed, allowing carbon monoxide to be emitted into the living area of the vessel. Harry Kisselman, Jr. and Bud Kisselman were killed while Jerry Kisselman and Don Buchanan suffered hypoxic injuries resulting from carbon monoxide asphyxiation. Don Buchanan was in a coma for twenty-seven days and suffered brain damage, drop foot, and lost his right arm just below the shoulder.

A lawsuit was filed, Kisselman v. Onan Corporation, et al, and consolidated with the Buchanan boy's lawsuit. Onan was placed on notice during the Kisselman litigation that the galvanized steel exhaust pipe nipple which connected the MCCK generator manifold and exhaust elbow assembly would corrode from the inside out and fail, causing carbon monoxide to be

emitted into the cabin areas of the vessel where serious personal injury and death would occur. In fact, in September of 1974, Onan sent three long time Onan employees, including the designer of the part, Mr. Wayne Clemens; Onan's metallurgist, Mr. James Eaton; and Onan service representative, Mr. Tom Davison; to examine the Kisselman vessel and failed MCCK galvanized steel exhaust pipe nipple. Onan designated these Onan representatives as experts in Kisselman.

In Kisselman, Onan admitted that the failed MCCK galvanized steel exhaust pipe nipple was of the same measurement and type as that supplied by Onan. Onan admitted that the temperatures of the exhaust gases passing through the exhaust pipe nipple were in excess of 800°F. Onan admitted that water would get back into the inside of the MCCK galvanized steel exhaust pipe nipple. Onan employees admitted that the Kisselman MCCK galvanized steel exhaust pipe nipple corroded from the inside out making a visual inspection of the exhaust pipe nipple useless, impossible and dangerous. Onan employees admitted that stainless steel inhibited rust and corrosion better than galvanized steel. Onan employees admitted that galvanized steel pipe nipples had a five year life. Onan employees admitted that cost was the sole reason for not using stainless steel in this application. During the Kisselman litigation, Onan admitted that the failed MCCK galvanized steel exhaust pipe nipple caused two serious personal injuries and two deaths due to carbon monoxide asphyxiation.

STEELE (1973)

Also, during his Kisselman deposition, Mr. Jerry Moore, a marine mechanic, placed Onan on notice that he was involved in another MCCK galvanized steel exhaust pipe nipple failure in 1973, subsequent to the Kisselman incident and prior to his Kisselman deposition. This second failure was identical to the Kisselman failure. Mr. Moore informed Onan that the vessel passengers, including Dr. Steele and his family, were also over-

come by carbon monoxide as a result of the MCCK galvanized steel exhaust pipe nipple corroding from the inside out of the Steele vessel, the M/V "Steele Away." Dr. Steele's daughter was hospitalized due to carbon monoxide asphyxiation. Onan's notice of this incident was confirmed by Onan's Answers to Interrogatories in Kisselman on July 29, 1976, in which Onan listed the Steele incident as communicated to it by Mr. Moore.

Onan's decision, after the Kisselman deaths and injuries and the Steele injury, not to immediately correct the MCCK galvanized steel exhaust pipe nipple problem or warn the remaining MCCK end users of their potential peril, constitutes conduct which evidences a complete disregard for the public's safety. As a matter of fact, the incidents which occurred beginning with the Kisselman incident and prior to the present incident involve seven additional deaths and six additional hypoxic injuries. These injuries, including the ones suffered by the present plaintiffs, were clearly predictable, foreseeable and preventable. Onan, the manufacturer, in the best possible position to correct the problem, chose to do nothing except conceal the problem from the remaining MCCK end users. Consequently, another incident occurred of which Onan received notice while the Kisselman litigation was still ongoing.

BUCHANAN (1976)

Onan again acquired knowledge of the characteristic of the MCCK galvanized steel exhaust pipe nipple to corrode from the inside out, fail, and emit carbon monoxide, resulting in serious personal injury and death. In 1976, another galvanized steel exhaust pipe nipple which connected another Onan MCCK generator and Onan exhaust elbow assembly corroded and failed near Birmingham, Alabama, resulting in two more deaths and two more hypoxic injuries. On July 11, 1976, a vessel owned by Mr. Jack Buchanan (no relation to Donald Buchanan, who was previously severely injured in the Kisselman case) was anchored near other boats on Logan Martin Lake. Mr. Buchanan,

age 52, his wife Mrs. Dottie Buchanan, age 45, his daughter Ms. Jackie Buchanan, age 13, and family friend, Ms. Barbara Sullivan, age 23, planned to spend the night aboard Mr. Buchanan's vessel.

At the time they retired for the night, an Onan MCCK generator was operating to provide electricity for the vessel. During the night, while they were asleep, carbon monoxide was emitted from a failed galvanized steel exhaust pipe nipple into the cabin of the vessel, resulting in the death of Mrs. Buchanan and Ms. Sullivan, while Mr. Buchanan and Ms. Buchanan suffered hypoxic injuries. The MCCK galvanized steel exhaust pipe nipple corroded from the inside out and failed.

The Buchanan incident occurred on July 11, 1976. Just ten days after the incident, Onan contacted its dealer and distributor for Alabama, Mr. John Atchison, to examine the Buchanan MCCK generator. On July 21, 1976, Mr. John Atchison examined the Buchanan MCCK generator and determined that the galvanized steel exhaust pipe nipple which connected the Onan MCCK generator manifold and exhaust elbow assembly corroded and failed.

Mr. Atchison gave deposition testimony in Buchanan on April 14, 1981, five years after his examination of the Buchanan MCCK generator and more than eight years before the deaths of Mr. Brodtmann, Mr. Hogan and Mr. Dehon, and hypoxic injuries to Mr. Duke, in which he testified that the MCCK one inch by two inch galvanized steel exhaust pipe nipple corroded from the inside out and failed, resulting in the emission of carbon monoxide into the Buchanan vessel. Mr. Atchison testified that he telephoned Onan management that same day and told them what he had found. Mr. Atchison generated a report on July 22, 1976, confirming his investigation of the Buchanan MCCK generator.

A lawsuit was filed in 1977 entitled Buchanan v. Onan Corporation, et al. Onan employees investigated the Buchanan

incident extensively, and later Onan admitted that the galvanized steel exhaust pipe nipple which connected the MCCK generator manifold and exhaust elbow assembly failed, resulting in the emission of carbon monoxide. Onan admitted that Mrs. Dottie Buchanan and Miss Barbara Sullivan died of carbon monoxide asphyxiation while Mr. Jack Buchanan and Miss Jackie Buchanan suffered hypoxic injuries by carbon monoxide asphyxiation. Onan admitted that it initially believed the MCCK galvanized steel exhaust pipe nipple would last as long as the other parts of the Onan exhaust elbow assembly. Obviously, Onan was wrong.

Despite all of the information learned by Onan through the Buchanan (1976) incident, the Steele (1973) incident and the Kisselman (1973) incident, Onan did not change the material composition of the exhaust pipe nipple from galvanized steel to stainless steel on new MCCK units produced and, more importantly, Onan did not warn the remaining MCCK end users of the defective design of the MCCK galvanized steel exhaust pipe nipple. Onan did not conduct a recall. Instead, Onan effectively concealed the information learned in the Kisselman and the Buchanan cases. Consequently, another incident occurred of which Onan learned and received notice while the Buchanan litigation was still ongoing.

WHITE (1981)

In 1981, Onan again acquired knowledge of the characteristic of the MCCK galvanized steel exhaust nipple to corrode from the inside out, fail, emit carbon monoxide, resulting in serious injury. Onan was placed on notice by Mr. and Mrs. Steele White that the MCCK galvanized steel pipe nipple corroded from the inside out and failed, causing carbon monoxide to be emitted into the living area of the vessel known as the "STEELE'S JOY." Mr. and Mrs. White suffered hypoxic injuries as a result of carbon monoxide asphyxiation. They were taken to the hospital and later released.

Onan was informed that the White incident involved the corrosion failure of the MCCK galvanized steel pipe nipple which connected the Onan MCCK manifold and the exhaust elbow assembly aboard the White's vessel. Onan conducted no investigation of the failed MCCK galvanized steel exhaust pipe nipple aboard the "STEELE'S JOY." Onan had no contact with the Whites because they did not think the failure to be a legal problem. Onan simply paid a warranty adjustment claim to the Whites and had the failed parts returned to Onan. Whether it was a health or safety problem was of no consequence to Onan.

Onan did not warn the remaining MCCK end users of the knowledge acquired by it from the White (1981), Buchanan (1976), Steele (1973) and Kisselman (1973) incidents. Armed with the information that the MCCK galvanized steel exhaust pipe nipple would corrode from the inside out and fail as was indicated by the Kisselman incident, the Steele incident, the Buchanan incident, and the White incident, Onan did not warn the remaining MCCK end users that by the end of 1981 at least four people had died and seven people were injured by carbon monoxide asphyxiation as a result of the repeated MCCK galvanized steel exhaust pipe nipple corrosion failures. Consequently another incident occurred.

HOROVITZ (1983)

In 1983, Onan was again placed on notice by another MCCK end user when yet another MCCK galvanized steel exhaust pipe nipple, attached to yet another MCCK generator, corroded from the inside out and failed, and emitted carbon monoxide. That incident occurred aboard a vessel known as the "JINGLE MAMA." The "JINGLE MAMA" was located in Providence, Rhode Island. On May 14, 1983, Mr. David M. Horovitz, age 58, owner and operator of the "JINGLE MAMA," and his wife, Maida Horovitz, age 55, were aboard the "JINGLE MAMA." As they retired for the evening, the Onan MCCK generator was operating to provide electricity for the vessel. The

MCCK galvanized steel exhaust pipe nipple which connected the Horovitz MCCK generator manifold and exhaust elbow assembly corroded from the inside out and failed. During the night, carbon monoxide was emitted from the failed MCCK galvanized steel exhaust pipe nipple into the cabin of the Horovitz vessel. As a result of carbon monoxide asphyxiation, Mr. Horovitz died and Mrs. Horovitz suffered serious hypoxic injuries.

A lawsuit was filed in 1984 entitled Horovitz v. Onan Corporation, et al. During the course of that litigation, Onan conducted an investigation and determined that the MCCK galvanized steel exhaust pipe nipple corroded and failed, resulting in the death of Mr. Horovitz and hypoxic injuries suffered by Mrs. Horovitz.

In spite of the information learned by Onan during the Kisselman (1973) case, the Steele (1973) incident, the Buchanan (1976) case, the White (1981) incident, and the Horovitz (1983) investigation, Onan did not warn the remaining end users of the defective design of the MCCK galvanized steel exhaust pipe nipple, nor did it recall the remaining MCCK galvanized steel exhaust pipe nipples. Onan simply suppressed the information. By 1983, at least five people had died and seven people had suffered hypoxic injuries as a result of the MCCK galvanized steel pipe nipple corroding from the inside out, failing and emitting carbon monoxide. It goes without saying, another incident occurred.

SHRIVER (1985)

Onan again acquired knowledge of the characteristic of the Onan MCCK galvanized steel pipe nipple to corrode from the inside out, fail, and emit carbon monoxide, resulting in serious injury and death. In 1985, yet another galvanized steel exhaust pipe nipple attached to yet another Onan MCCK generator corroded from the inside out and failed aboard a vessel known as "RESOLUTE II." At the time of the incident, the "RESO-

LUTE II" was anchored on a navigable lake near Chattanooga, Tennessee. As a result of the MCCK galvanized steel exhaust pipe nipple failure, carbon monoxide was emitted into the cabin area of the "RESOLUTE II" resulting in one death and one serious hypoxic injury.

On September 17, 1985, Mr. James Shriver, age 45, owner and operator of the "RESOLUTE II", and his wife Mrs. Ann Kennedy Shriver, age 45, spent the night aboard the "RESOLUTE II" while it was anchored on a lake near Chattanooga, Tennessee. They were to return home the morning of September 18, 1985. They never did. When the Shrivers retired for the night, the MCCK generator installed aboard the "RESOLUTE II" was operating. The MCCK galvanized steel exhaust pipe nipple attached to the Onan MCCK generator manifold corroded from the inside out and failed, resulting in the emission of carbon monoxide into the cabin area of the vessel. Mrs. Shriver died of carbon monoxide poisoning, while Mr. Shriver suffered severe and permanent hypoxic injuries and died years later from his injuries.

A lawsuit was filed and entitled Shriver v. Onan Corporation, et al. During the course of the litigation, Onan admitted that the MCCK galvanized steel exhaust pipe nipple corroded from the inside out and failed, resulting on the emission of carbon monoxide into the living area of the Shriver vessel. Despite the information learned in the Shriver (1985) case, the Horovitz (1983) case, the White (1981) incident, the Buchanan (1976) case, the Steele (1973) incident and the Kisselman (1973) case, Onan failed to warn the remaining end users of their potential peril or conduct a recall. By 1985, at least six people had died and eight people had suffered severe hypoxic injuries, that we know of, as result of the repeated MCCK galvanized steel exhaust pipe nipple corrosion failures.

ONAN ACKNOWLEDGED THE PROBLEM

Onan's knowledge of this deadly problem -- and its repeated decisions not to prevent further injury to the public -- is amply demonstrated by these multiple lawsuits and the testimony and admissions adduced in them. Onan's indifference to the public's safety is also evidenced by Onan's internal actions. In 1976, Onan warned only selected Onan dealers and distributors, but not the end users already imperiled, that the exhaust pipe nipple would fail, resulting in serious injury or death. In 1982, Onan changed the thickness of the nipple from Schedule 40 galvanized steel to Schedule 80 on new MCCK units produced. In 1984, Onan changed the material composition of this part from galvanized to stainless steel on new MCCK units produced. In 1986, Onan released the stainless steel pipe nipple for use as a replacement part. In 1987, Onan discontinued the MCCK generator entirely. However, Onan never did what it had an absolute duty to do -- warn the remaining MCCK end users of their potential peril. Again, needless to say, the present incident occurred.

FACTORS WARRANTING CERTIORARI REVIEW

Despite a split in the Louisiana appellate courts, the Louisiana Supreme Court denied the petitioner's writ application. This decision below conflicts with the holding of the United States Court of Appeals for the First Circuit in CEH v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995). Further, the availability of punitive damages under the general maritime law has not been addressed by this Court in modern times, although this Court's older decisions clearly state that such damages are available[1].

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[1] See Jecker v. Montgomery, 54 U.S. (13 How.) 498, 503 (1851); Fretz v. Bull, 53 U.S. (12 How.) 466, 467 (1851); The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 8, 36 (1825); The Appollon, 22 U.S. (9 Wheat.) 362, 374 (1824); The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 55-56, 97 (1821); La Amista de Rues, 18 U.S. (5 Wheat.) 385, 389 (1820); The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818).

Most important, the federal court opinions are in direct conflict. The majority of the circuit courts, like the United States First Circuit Court of Appeals in CEH, have held that punitive damages are available under the general maritime law, at least to persons who are not encompassed by maritime court statutory schemes such as the Jones Act, 46 U.S.C. § 688, et seq.[2] Others have held that the general maritime law does not provide recovery for punitive damages even by persons who are not subject to the Jones Act.[3]

Thus, the lower court's decision: (1) misapplied federal law; (2) involves an issue upon which the federal courts, including the Circuit Courts of Appeal, are split; and, (3) involves an important federal issue. The factors of Rule 10 heavily weigh in favor of certiorari.

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[2] Warrior Gulf Navigation Co. Co., 121 F.3d 1421 (11th Cir. 1997); Gamma-10 Plastics, Inc. v. American President Lines, Ltd., 32 F.3d 1244 (8th Cir. 1994), cert. denied, 513 U.S. 1198, 115 S.Ct. 1270 (1995); Churchill v. F/V Fjord, 892 F.2d 763, 772 (9th Cir. 1988), cert. denied, 497 U.S. 1025, 110 S.Ct. 3273 (1990); In re: Complaint of Merry Shipping, 650 F.2d 622 (5th Cir. 1981); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085 (4th Cir.), cert. denied, 474 U.S. 846, 106 S. Ct. 136 (1985); Powers v. Bayliner Marine Corp., 855 F.Supp. 199, 202, aff'd without treating the issue, 83 F.3d 789 (6th Cir. 1996); Newhouse v. United States, 844 F.Supp. 1389, 1394 (D. Nev. 1994); In re Morehead Marine, 844 F.Supp. 1193, 1196-97 (S.D. Ohio 1994).

[3] Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1094 (2nd Cir. 1983); Miller v. American President Lines, 989 F.2d 1450 (6th Cir.) cert. denied, 114 S.Ct. 304 (1993); Cochran v. A/H Battery Associates, 902 F.Supp. 911, 921-22 (S.D. NY 1995); Bardwell v. George G. Sharp, Inc., 1995 WL 517120 (E.D. La. 1995); and Frantz v. Brunswick Corp., 866 F.Supp. 527, 532 (S.D. Fla. 1994).

ARGUMENT

A. The Courts are Misconstruing Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317 (1990)

The primary point of contention among those cases which disagree over the recoverability of punitive damages under the general maritime law by persons not encompassed by federal maritime statutory tort schemes is the correct interpretation of this Court's decision in Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317 (1990). In Miles, this Court held that the mother of a seaman killed by the unseaworthiness of the employer's vessel could not recover damages for loss of society. The Jones Act only provides for the recovery of pecuniary damages. This Court reasoned that neither the Jones Act nor the Death on the High Seas Act, 46 U.S.C.A. §761, et seq., allowed such damages, because they constitute "non-pecuniary" damages. This Court in Miles concluded that since Congress had not provided these remedies in the statutory schemes available to seamen, it would be inconsistent with Congress' intent to allow seamen to recover for these items under the general maritime law.

Miles did not discuss punitive damages. However, some courts have extended Miles to preclude recovery of punitive damages by injured Jones Act seamen. See, e.g., Horsley v. Mobil Oil Corp., 15 F.3d 200, 202 (1st Cir. 1994). Some have even extended the perceived prohibition to non-seamen.[4]

Those cases which interpret Miles as prohibiting punitive damages to a non-seaman under the general maritime law are clearly in error. This Court's decisions recognize repeatedly that punitive damages are available under the general maritime law. See cases cited at fn. 2, supra. Most pre-Miles circuit, district and state court decisions recognize that punitive dam-

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[4] See Wahlstrom, 4 F.3d at 1094; Cochran, 902 F.Supp. at 921-22; Bardwell, 195 WL 517120 at 2; and Frantz, 866 F.Supp. at 532.

ages are available under the general maritime law as well.[5] Miles did not, directly or by implication, affect the validity of those decisions, nor does Miles apply to the remedies of non-seamen. Those cases which are construing Miles to preclude recovery for punitive damages by persons not subject to federal statutory maritime tort schemes are misapprehending the scope and significance of the Miles decision.

Miles is ostensibly based on this Court's desire to create uniformity between the statutory rights afforded seamen by the Jones Act and the rights enjoyed by such seamen under the general maritime law. In Miles, the Court reasoned that Congress did not intend for seamen to enjoy greater rights under the general maritime law than Congress had provided for in the pertinent statutory schemes. However, in cases which do not involve a federal maritime statutory tort scheme, no such inconsistency with Congressional intent is implicated. The perceived need for uniformity between federal statutory law and the federal general maritime law is simply not present. This Court should grant this Writ to curtail a growing number of erroneous applications of Miles.

Because the Congressionally protected Jones Act seaman was given rights not enjoyed by other classes of plaintiffs under admiralty law, the restriction on the recovery of damages by a Jones Act seaman to "pecuniary damages" is an arguably justifiable trade-off. This rationale, employed by the Louisiana cases involved here via Miles, realizes that Jones Act seamen are allowed certain privileges unavailable to other classes of plaintiffs under admiralty law. Among other things, seamen are considered wards of the court, have a claim in tort against their employer, have a claim for unseaworthiness, have a feather-

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[5] See, e.g., Churchill v. F/V Fjord, 892 F.2d 763, 772 (9th Cir. 1988), cert. denied, 497 U.S. 1025 (1990); Seguros Banvenez S.A. v. S/S Oliver Drescher, 761 F.2d 855, 861 (2nd Cir. 1985); Evich v. Morris, 819 F.2d 256, 257-58 (9th Cir.) cert. denied, 484 U.S. 814 (1987).

weight burden of proof, and receive maintenance and cure until they reach maximum medical cure. Under admiralty law, the non-seaman does not enjoy the privileges readily available to a seaman by virtue of the Jones Act. Thus, employing the "uniformity" principle to limit the rights and remedies available to non-seamen under general maritime law to pecuniary damages would be patently inequitable and unfair without simultaneously bestowing upon the non-seaman the same privileges available to a seaman.

Furthermore, the "uniformity" principle implemented by this Court in Marange v. States Marine Lines, Inc., 398 U.S. 375, 387, 90 S.Ct. 1772 (1970), centered on the extension of relief, not on the contraction (restriction) of remedies. Yamaha Motor Corp., USA v. Calhoun, 116 S.Ct. 619, 627 (1996). In Yamaha, this Honorable Court, citing Marange, stated in pertinent part:

> It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold a remedy, when not required to withhold it by established and inflexible rules. Marange v. States Marine Lines, Inc., 398 U.S. 375, 387, 90 S.Ct. 1772 (1970). Id. at 627.

Applying the above reasoning of this Court in Yamaha, to contract (restrict) or withhold the Brodtmanns' remedy of punitive damages instead of allowing the relief would be contrary to the basic notion of the principle of uniformity in admiralty law.

Plaintiffs ask this Honorable Court to follow established general maritime law and adopt the reasoning of the United States First Circuit Court of Appeals in CEH v. F/V Seafarer, *supra*. The CEH case is on point and governs the issue of punitive damages for non-seamen under general maritime law. As previously mentioned, punitive damages have long been recognized as an available remedy in general maritime actions where defendant's wanton and reckless conduct amounts to a conscious disregard for the rights of others. CEH at 699. The CEH court observed:

> Nevertheless, in the wake of *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), courts have been increasingly hesitant to allow punitive damages in certain general maritime actions involving personal injury or death. In *Miles*, the Court held, *inter alia*, that damages recoverable in an action for the wrongful death of a seaman do not include loss of society. *Id.* at 37, 111 S.Ct. at 328. In reaching this conclusion, the Court enunciated principles of uniformity relevant to wrongful death actions, and more broadly, to maritime tort law, which have moved subsequent courts to limit recovery in other similar contexts. Defendants ask us to extend *Miles* to bar recovery of punitive damages in all general maritime cases. However, as described more fully below, we believe *Miles* is inapposite to plaintiff's maritime claim.

The court reasoned:

> Though these principles of uniformity defy precise limits, we think it clear that the Supreme Court had in mind the need to defer to statutory enactments addressing like issues. As the Court reasoned: "In this era, an admiralty court should look primarily to these legislative enactments for policy guidance ....[and] must be vigilant not to overstep the well-considered boundaries imposed by federal legislations." *Miles*, 498 U.S. at 27, 111 S.Ct. at 322.

The CEH court concluded:

> *Miles* ... does not ... signify a call for universal uniformity of maritime tort remedy, but rather emphasizes the importance of uniformity in the face of applicable legislation.

In the lower courts, Onan has argued that Miles and cases such as Guevara v. Maritime Overseas Corp., 34 F.3d 1279 (5th Cir. 1994), preclude the Brodtmanns' claim for punitive damages under general maritime law. Onan's argument is misplaced. These cases involved claims by seamen which are governed and limited by Congressional expression, a uniform federal rule

known as the Jones Act. The Miles v. Apex decision involved compensatory remedies available to an injured seaman, not punitive damages. The Guevara court eliminated the claim for punitive damages by a seaman in a maintenance and cure situation only. These cases simply do not address, much less eliminate, the claim for punitive damages by a non-seaman under general maritime law. Therefore, they are inapposite to the facts and law of the issue before the Court.

Regarding Guevara the CEH court reasoned that:

> While at first glance, *Guevara* may seem to provide comfort to defendants, a closer reading supports our belief that *Miles* simply is irrelevant here. ...
>
> *Guevara* does not assist defendants in any way. Rather, it merely illustrates, as do the other post-*Miles* cases cited above, that *Miles* may be applicable in those areas of maritime law where, at the very least, there is an overlap between statutory and decisional law.

In the present case, there is no federal legislation whatsoever that touches upon or precludes the claim for and recovery of punitive damages by the Brodtmanns for the actions and inactions of Onan which were so wanton and reckless as to demonstrate a conscious disregard for the rights of others. Muratore v. M/S Scotia Prince, 845 F.2d 347, 354 (1st Cir. 1988)(standard for imposition of punitive damages).

Once the transparent legal impediment of allowing the Jones Act to limit the rights and remedies of non-seamen is removed, it is evident that the claim for and recovery of punitive damages is available to the survivors of a non-seaman under general maritime law. Onan's decision, after acquiring knowledge of the many deaths and injuries, not to immediately take measures to correct the MCCK galvanized steel exhaust pipe nipple problem and warn the remaining MCCK end users of their potential peril, constitutes malicious conduct which evi-

dences a conscious disregard of the rights of others. Muratore, 845 F.2d at 354.

B. Punitive Damages Are Not Non-Pecuniary In Nature and The Jones Act Should Not Preclude Recovery of Punitive Damages

Many post-Miles cases seem to treat the nonavailability of punitive damages under the Jones Act as a settled proposition. A closer analysis of the history of the Jones Act demonstrates that those cases are in error. Punitive damages have always been available as a maritime tort remedy. The Jones Act did not take that remedy away. Thus, courts are construing Miles in at least two ways: First, by extending the perceived need for uniformity in the maritime tort law to persons and claims not encompassed by a Congressionally-provided statutory tort scheme in order to take away remedies; and second, by reasoning that Miles supports the conclusion that punitive damages are not available to Jones Act seamen because they are "non-pecuniary" in nature.

Miles did not even address the recoverability of punitive damages by Jones Act seamen. Nonetheless, post-Miles decisions have concluded that punitive damages are not available to seamen under the Jones Act. See, e.g., In Re: Mardoc, 768 F.Supp. 595 (E.D. Mich. 1991). Mardoc and other cases reason that since the FELA recovery provisions which the Jones Act incorporates do not allow recovery for punitive damages, neither does the Jones Act itself. This reasoning is erroneous.

There are apparently no pre-Jones Act decisions denying, or even discussing, recovery of punitive damages under FELA. As the Miles court pointed out, in Michigan Central Rail Co. v. Vreeland, 227 U.S. 59, 33 S.Ct. 192 (1913), this Court denied a FELA claim for "loss of society" by the dependent of a deceased railroad worker, finding that FELA's reference to "damages" was intended to signify only "pecuniary loss"

and that "loss of society" was not such a recoverable pecuniary loss. However, neither Vreeland nor any other pre-Jones Act cases addressed the recoverability of punitive damages under FELA[6].

At the time Congress enacted the Jones Act, FELA did not preclude recovery of punitive damages. Even if FELA had precluded recovery of punitive damages, this Court has at least twice held that even express FELA language does not control Jones Act cases if, "maritime law before the enactment of the Jones Act" or "advancing civilization and social progress" direct a statutory construction of the Jones Act even more favorable to seamen than the express language of FELA. The Arizona v. Anelich, 298 U.S. 110, 120, ___ S.Ct. ___ (1936) (refusing to apply the assumption of risk defense against a seaman even though FELA then specifically provided for it); Cox v. Roth, 348 U.S. 207, 209-10, ___ S.Ct. ____ (1955) (holding that a Jones Act suit survives the death of a tortfeasor even though "literal application of the words of the FELA" would dictate a different result). Here, maritime law before the Jones Act indisputably allowed for recovery of punitive damages by seamen. The Jones Act's incorporation of FELA provisions should not be construed as a Congressional intent to deprive seamen of that settled remedy.

The Miles court, as noted, dealt only with damages for loss of society; it did not address the recoverability of punitive

[6] Some later decisions, notably Kozar v. Chesapeake & Ohio R.R. Co., 449 F.2d 1238, 1240 (6th Cir. 1971), reasoned that punitive damages are a nonrecoverable "pecuniary loss" within the meaning of Vreeland. However, this conclusion in 1971 totally misreads Congress' intent in 1920. At that time, there was no body of law, much less any settled rule, on the recoverability of punitive damages under FELA. To conclude that Congress intended through its incorporation of FELA to deprive seamen of the right to recover punitive damages is a quantum leap not supported by the language, history or purpose of the Jones Act.

damages. The Miles court reasoned that "loss of society" was a "nonpecuniary damage" not available under FELA or the Jones Act. The classification of punitive damages as "non-pecuniary" is problematic. There are three types of damages that are available in this case: Special damages (pecuniary); general damages (non-pecuniary); and punitive damages. Pecuniary and non-pecuniary damages are compensatory in nature in that they are designed to compensate an injured party for monies lost (pecuniary) and mental suffering caused (non-pecuniary) by the tortious conduct of the defendant. Examples of pecuniary damages are lost income, medical expenses, loss of capacity to earn a living and funeral expenses. Examples of non-pecuniary damages are loss of society, loss of love and affection, and loss of consortium. In re: Waterman S.S. Corp., 780 F.Supp. 1093,1094 (E.D.La. 1992).

Punitive damages are different than compensatory damages and should not be classified as "nonpecuniary."[7] Punitive damages are not designed to compensate an injured plaintiff, like general (non-pecuniary) or special (pecuniary) damages, but to punish the defendant/wrongdoer when the defendant has acted willfully and with gross disregard for the safety of the plaintiff, hopefully teaching him not to engage in the willful and wanton conduct again. CEH v. F/V Seafarer, *supra*. Punitive damages are also designed to make an example of the defendant wrongdoer to deter others from acting similarly in the future. CEH v. F/V Seafarer, *supra*. Punitive damages are determined in part by the pecuniary worth of the defendant. The

[7] Wahlstrom, 4 F.3d at 1094, reasoned that principles of uniformity prohibited recovery of non-pecuniary damages under state wrongful death statutes, and that punitive damages were not recoverable under the general maritime law because punitive damages were "non-pecuniary." This Court, in Yamaha, has already overruled Wahlstrom's conclusion that state law remedies could not supplement general maritime law; Wahlstrom's holding that punitive damages are "non-pecuniary" is also incorrect.

essential question in determining the amount of punitive damages is what amount of money is necessary to punish the defendant so that the wrong will not again occur?

This Court has itself held that the incorporation of FELA is not to be construed to deprive seamen of rights they enjoyed at the times the Jones Act was passed. Seamen clearly enjoyed the right to punitive damages in 1920. Neither the Jones Act nor Congress' incorporation of the FELA provisions took that right away.[8]

In any event, no case of this Honorable Court, nor any statute of Congress, has ever taken away the rights of nonseamen under the general maritime law. This settled remedy was, is and remains available to plaintiffs such as the Brodtmanns.

C. Punitive Damages Have Always Been and RemainAvailable to Non-Seamen Under the General Maritime Law

Punitive damages have always been available under the general maritime law. No case of this Court, and no Congressional statute, has ever taken them away. At the very least, these cases which interpret the Jones Act as prohibiting recovery of punitive damages by non-seamen under the general maritime law are erroneous.

The uniformity concerns reflected in Miles simply do not apply to non-seamen injured in territorial waters. No federal maritime statutory tort scheme applies. There is simply no

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[8] In fact, several post-Jones Act, pre-Miles cases recognize that punitive damages are available to seamen under the general maritime law claim of unseaworthiness. In Re: Marine Sulphur Queen, 460 F.2d 89, 105 (1972); United States Steel Corp. v. Fuhrman, 407 F.2d 1143, 1148 (6th Cir. 1969); Murray v. Hunt, 552 F. Supp. 234, 237 (S.D. Fla. 1982); Baptiste v. Superior Court, 164 Cal. Rptr. 789, 793-798 (Cal. App. 2d Dist. 1980); Miles v. Melrose, 882 F.2d 976, 981 (5th Cir. 1989); and In re: Merry Shipping, 650 F.2d 622, 625 (5th Cir. 1981).

reason of law or policy to preclude recovery of punitive damages by non-seamen under the general maritime law.

The damages available to different classes of plaintiffs under admiralty law are different. For instance, in Chan v. Society Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994), the court explained the different claims available to different class of plaintiffs under admiralty law.[9]

In Miles, *supra*, this Court recognized the importance of status when it noted the fact that Jones Act seamen are treated differently in wrongful death actions in territorial waters than longshoremen in wrongful death actions in territorial waters. Miles, *supra*, and Gaudet, *supra*. In short, Jones Act seamen are better treated in admiralty than are longshoremen, who are both treated better and differently than non-seafarers such as Mr. Brodtmann. According to this Court, the purpose of the admiralty principle of uniformity was to unify the rights and remedies available to certain classes of plaintiffs such as Jones Act seamen. "Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." Miles v. Apex, *Id.* at 33. (Emphasis added). There are also long- established rules regarding the rights and remedies available to a longshoreman harbor worker as well as non-seafarers.

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[9] "[21][22] Loss of society damages are also not recoverable under the Jones Act, or under the general maritime law, for the wrongful death of a seaman. Miles, 498 U.S. at 31, 111 S.Ct. at 325. They are likewise unavailable in connection with the injury of a Jones Act seaman. Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993). In cases involving longshoremen injured or killed on state territorial waters, however, beneficiaries can recover loss of society damages. Gaudet, 414 U.S. at 584, 94 S.Ct. at 814 (as limited by Miles, 498 U.S. at 31-32, 111 S. Ct. at 325); Randall v. Chevron U.S.A., Inc., 13 F.3d 888, 903 (5th Cir. 1994). We have also held that the beneficiaries of passengers killed or injured on state territorial waters can recover such damages." Chan v. Society Expeditions, Inc. supra.

Applicants offer the following hypothetical to evidence the flaw of the reasoning in cases such as Wahlstrom, *supra*. A motor vessel owned by Company A and operated by an employee of Company A leaves Venice, Louisiana at night for an offshore rig within three mile territorial waters of this state. Employee A, who happens to be assigned to the Company A vessel as a member of the crew (a Jones Act seaman), and Passenger A (a non-seaman), who is being transported to the rig to work on that rig are on the vessel. The motor vessel strikes a well-lit platform. Employee A and Passenger A are killed. It is well settled that Employee A, who is a Jones Act seaman assigned to the motor vessel in furtherance of its mission, has certain rights and remedies not available to Passenger A, who is a non-seaman or non-seafarer. Under the Jones Act, the Jones Act seaman has a featherweight burden of proof against the boat owner and under general maritime law has a claim for unseaworthiness. He can receive maintenance and cure until he reaches maximum medical cure and his survivors will be allowed to sue the boat owner for unseaworthiness and his employer in tort. However, pursuant to the Jones Act, he will not be able to recover non-pecuniary damages or make a claim for punitive damages. He may not make a claim against his employer or any third parties for non-pecuniary damages because Miles unified the rights of a Jones Act seaman.

Passenger A, however, who was a passenger aboard the motor vessel simply has a claim in tort wherein he may make a claim for pecuniary damages and non-pecuniary damages, as well as a claim for punitive damages under general maritime law. While he has these claims, he does not have the right to sue his employer in tort, he does not have a claim for unseaworthiness, nor does he have a featherweight burden of proof, nor does he have the right to receive maintenance and cure until he reaches maximum medical cure. In other words, the Jones Act seaman, one class of plaintiff, has a uniform set of rem-

edies available to him, while the non-seafarer has a different set of remedies available to him under general maritime law. Applying Wahlstrom's logic to its ultimate conclusion would limit a non-seafarer to only those claims involving pecuniary damages, while barring the non-seafarer from reaping any of the benefits or special solicitude allowed to the seaman.

Compared to a non-seaman, a seaman is given unparalleled solicitude. Allowing a non-seaman such as the survivors of Mr. Brodtmann, to make a claim for punitive damages under general maritime law does not degrade or lessen the rights of a seaman in any way. If Congress had intended such a result, the Jones Act would not have been limited to the rights and remedies of the individual seaman. If Congress had intended such a result, Congress would have enacted a statute which eliminated the right of a non-seaman to make a claim for punitive damages.

Denying punitive damages to non-seamen who are outside the Congressionally defined class of Jones Act claimants, ignores literally hundreds of years of maritime and common law jurisprudence. The earliest rendered common law decisions used the vocabulary of punishment to explain and uphold jury awards. Huckle v. Money, 95 E.R. 768 (K.B. 1763); Wilkes v. Wood, 98 E.R. 489 (K.B. 1763). The American courts explicitly approved "exemplary damages" no later than 1791. Corzell v. Colbaugh, 1 N.J.L. (Coxe) 90 (1791). By the middle of the nineteenth century, punitive damages were well established in the American common law. Day v. Woodworth, 54 U.S. (13 How.) 363 (1851).

The recoverability of punitive damages has been long recognized in the maritime jurisprudence as well. This Court's decisions are cited at footnote 2, *supra*. From the revolution until the passage of the Jones Act in 1920, numerous lower court

decisions recognized the availability of punitive damages under the maritime law.[10]

Punitive damages are an important part of the common and general maritime law because they deter wrongful conduct and punish the callous wrongdoer. Within our legal system, judges are often requested to determine and promote safety for the benefit of the citizens of our great country. To remove from our judiciary the ability to punish and deter defendant wrongdoers acting in a willfully wanton and reckless manner which demonstrates a conscious disregard for the rights of others is tantamount to sanctioning such conduct. The availability of punitive damages promotes safety by encouraging decent and safe conduct. This Court should recognize the continuing availability of this important part of our legal heritage.

Throughout the history of this country, plaintiffs like the Brodtmanns have been able to seek punitive damages under the general maritime law. Neither Congress nor this Court have ever taken this right away. Those cases which construe Miles as doing so are erroneous and should be corrected.

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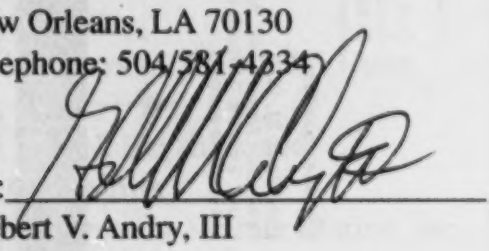
[10] Unica v. United States, 287 F. 177 (S.D. Ala. 1923); The Margharita, 140 F. 820, 821 (5th Cir. 1905); The Troop, 118 F. 769 (D. Wash. 1902), aff'd (9th Cir.), cert. denied sab nom Kennedy v. Louis, 195 U.S. 632 (1904); Downing v. Outerbridge, 79 F. 931, 934 (2nd Cir. 1897); The City of Carlisle, 39 F. 807, 811 (D. Ore. 1889); Gallagher v. The Yankee, 9 F. Cas. 1091 (N.D. Cal. 1859); McGuire v. The Golden Gates, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856); The Childe Harold, 5 F. Cas. 619, 620 (S.D. N.Y. 1846); Jay v. Almy, 13 F. Cas. 387, 389-90 (C.C.D. Mass. 1846); Steamboat Co. v. Whilldin, 4 Hav. 228 (Del. 1845); Ralston v. The States Rights, 20 F. Cas 201 (E.D. Pa. 1836); Sherwood v. Hall, 21 F.Cas. 1292, 1293 (C.C.D. Mass. 1837); The Lively, 15 F.Cas. (C.C.D. Mass. 1812).

CONCLUSION

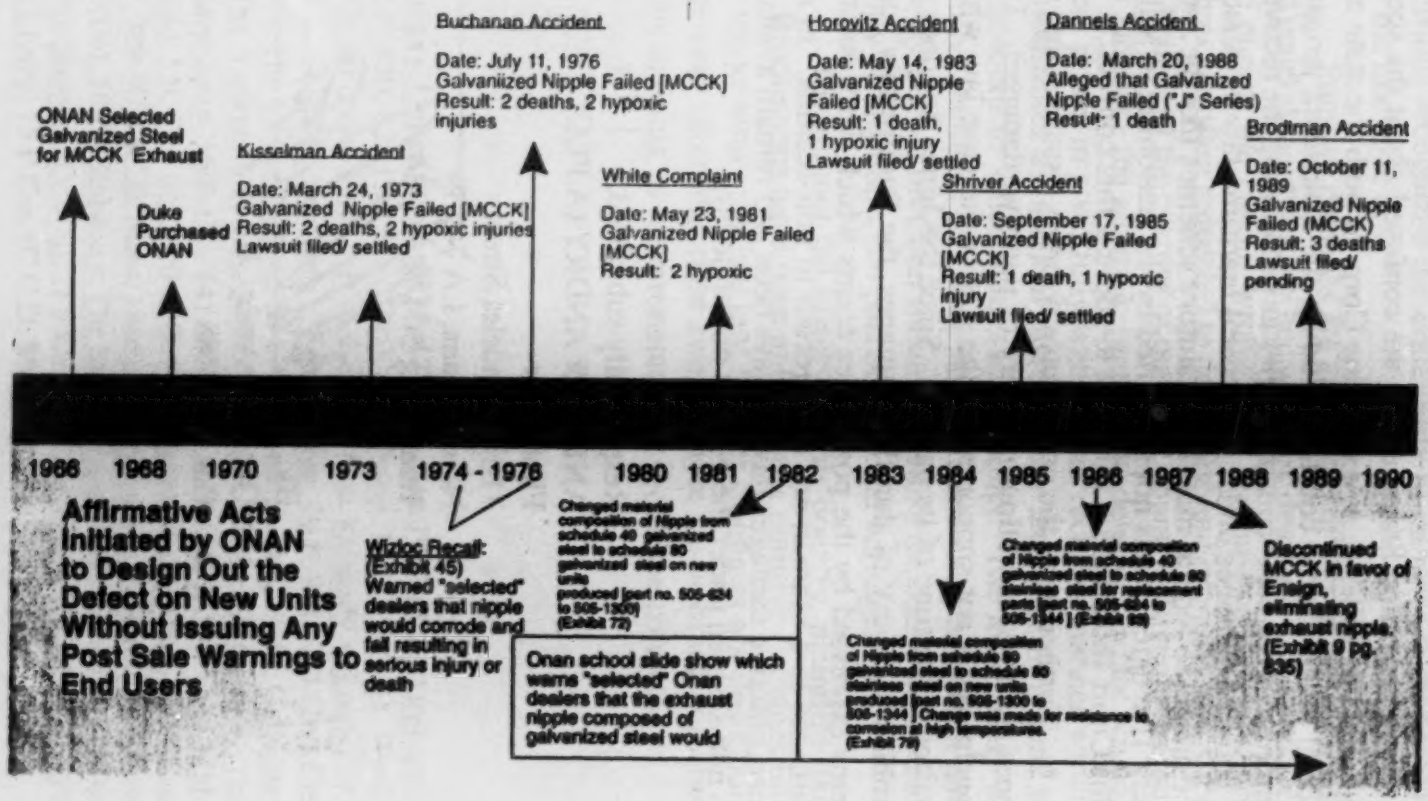
The United States courts are confused about the scope and effect of Miles v. Apex Marine Corp. at both the state and federal level. Some courts, including the Louisiana jurisprudence involved here, construe Miles as prohibiting the recovery of punitive damages under the general maritime law by persons not subject to federal maritime statutory schemes like the Jones Act. This extension is not supported by the reasoning of Miles. This Court should grant this Writ to address this conflict.

Furthermore, the courts have wrongly assumed that the Jones Act does not allow recovery of punitive damages. This conclusion is not supported by the Act or the case law which existed at the time of its passage. Since the Jones Act does not prohibit recovery of punitive damages, the "uniformity" concerns expressed by the post-Miles courts which deny punitive damages to a seaman are misdirected to non-seamen. In any case, punitive damages have always been and remain available to non-seamen under the general maritime law.

Respectfully submitted,
ANDRY & ANDRY (A PLC)
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Telephone: 504/581-4334

By: 
Gilbert V. Andry, III
Bar No. 2488

Repeated Catastrophic Failures of the Galvanized Exhaust Nipple of Which ONAN Had Knowledge



THIRTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

NO. 64-669 DIVISION "D"

MILLICENT CLESI BRODTMANN, wife of
EDWOOD S. BRODTMANN, et al

verus

CLAUDE W. DUKE, et al

FILED: MAY 2, 1995 [s]SABRINA FOLSE
Deputy Clerk

JUDGMENT

This matter came before the court for trial and was taken under advisement to all the parties to file post-trial memorand.

Present: Gilbert V. Andry, IV, and
Gilbert V. Andry, III
Attorneys for plaintiffs

Daniel A. Webb and
Eric A. Bopp
Attorneys for Claude W. Duke

T. Patrick Baynham and
J. Calvin Box
Attorneys for Kremer Marine, Inc.

Lawrence J. Ernst,
C. Edgar Cloutier, and
Patricia Broussard
Attorneys for Onan Corporation

After considering the pleadings filed, evidence introduced and the argument made by the attorneys,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment dismissing plaintiffs' claims for punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Millicent Clesi Brodtmann and against the defendants, Onan Corporation and Claude W. Duke, in the full and true sum of FIVE HUNDRED THOUSAND and 00/100 ($500,000.00) DOLLARS for general damages and ONE HUNDRED THOUSAND and 00/100 ($100,000.00) DOLLARS for economic damages, plus judicial interest from date of judicial demand and all costs of these proceedings.

IT FURTHER IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Edwood Brodtmann, II, and against the defendants, Onan Corporation and Claude W. Duke, in the full and true sum of ONE HUNDRED FIFTY THOUSAND and 00/100 ($150,000.00) DOLLARS for general damages, plus judicial interest from date of judicial demand and all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Richard Brodtmann and against the defendants, Onan Corporation and Claude W. Duke, in the full and true sum of ONE HUNDRED FIFTY THOUSAND and 00/100 ($150,000.00) DOLLARS for general damages, plus judicial interest from date of judicial demand and all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Lisa Brodtmann Bruno and against the defendants, Onan Corporation and Claude W. Duke, in the full and true sum of ONE HUNDRED FIFTY THOUSAND and 00/100 ($150,000.00) DOLLARS for general damages, plus judicial interest from date of judicial demand and all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Kremer Marine, Inc., against Millicent C. Brodtmann, Edwood Brodtmann, II, Richard Brodtmann, and, Lisa B. Bruno, on their claims; against Claude W. Duke on his cross-claim; and against Onan Corporation on its cross-claim. As a result of the foregoing Kremer Marine, Inc.'s claims against Onan Corporation for contribution and/or indemnity are dismissed. Kremer Marine, Inc.'s costs are assessed against plaintiffs, defendant Claude W. Duke, and defendant Onan Corporation, one-third (1/3) to each side.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Claude W. Duke against Onan Corporation in the full and true sum of Two Hundred Thousand and 00/100 ($200,000.00) Dollars, plus legal interest from date of demand and for all costs. It is further ordered that there be udgment in Claude W. Duke's favor on his claims for contribution and/or indemnity from Onan Corporation for any amounts Claude W. Duke is required to pay plaintiffs as a result of this judgment. Claude W. Duke's claim for limitation of liability is hereby dismissed. Claude W. Duke's claims for contribution and/or indemnity against Kremer Marine, Inc. are dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment dismissing the cross-claims and

claims for contribution and/or indemnity filed by defendant, Onan Corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, Onan Corporation be and is hereby assessed the following costs for expert witnesses testifying in these proceedings:

Dr. Gerald E. Liuzza	$500.00
Mr. Gene Jackson	450.00
Dr. Robert M. Rose	950.00
Mr. James F. Hills	950.00
Dr. Melville Wolfson	500.00
Dr. Gasparrini	350.00
Dr. G. Robert Murphy	350.00
Dr. Frank Liebkemann	750.00

JUDGMENT READ, RENDERED AND SIGNED in open court at CHALMETTE, LOUISIANA, this 2nd day of May, 1995.

[s] JUDGE KIRK A. VAUGHN

A TRUE COPY
LENA R. TORRES
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

BY; [s] SABRINA FOLSE
DEPUTY CLERK

THIRTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

NO. 64-669 DIVISION "D"

MILLICENT CLESI BRODTMANN, wife of
EDWOOD S. BRODTMANN, et al

versus

CLAUDE W. DUKE, et al

FILED: MAY 2,1995 [s] SABRINA FOLSE
DEPUTY CLERK

REASONS FOR JUDGMENT

In light of the decision in Bridgett vs. Odeco, Inc. *et al,* Docket No. 93-CA-1536 c/w 94-CA-0112 (4th Circuit, 1994), plaintiffs' claims for punitive damages have been denied. The evidence submitted at trial does not support a finding that Kremer Marine breached any duty owed any party. Since the claims made against Kremer Marine have not been proven the Court has rendered judgment accordingly.

On October 11, 1989, Douglas Blondo, while travelling by boat near Picnic Bayou in waters located in St. Bernard Parish, observed Claude W. Duke on the back of another vessth the "Peggy D". Claude W. Duke was the owner of the "Peggy D". Since Mr. Duke was hailing, Mr. Blondo investigated. Mr. Blondo boarded Mr. Duke's boat and discovered tha three men on board had died. Among the dead was Edwood S. Brodtmann, husband and father of plaintiffs.

Mr. Duke and the other three men had been fishing.

Investigation revealed that a component of an Onan MCCK Generator exhaust system, namely, a pipe nipple, had cracked. Because of this cracked nipple, carbon monoxide was capable of leaking out of the exhaust system when the generator was running. The carbon monoxide through this crack was released into the engine hole of the "Peggy D". Gas released in this fashion was capable of travelling into the cabin of the vessel. It was determined that Mr. Brodtmann and the other two men had died of carbon monoxie poisoning. The evidence submitted supports a finding that the Onan Generator had been in use prior to the death of the three men on the "Peggy D". Plaintiffs have met their burden of proving that the crack of the nipple was the source of the carbon monoxide and the resulting death of Mr. Brodtmann.

The trial of this case was lengthy by most standards. Much could be written at this point regarding the evidence presented at trial and the legal theories of the various parties. These reasons are not intended to be a compendium of the official record. Rather, this is an attempt to give a succinctly stated rationale for judgment with minimal repetition of the evidence presented and preserved in the official record of this trial. These reasons set forth only what is perceived to be one readily-apparent source of liability for Onan Corporation although others may be (and have been) argued to exist.

Pursuant to Article 1917 of the Code of Civil Procedure, the Court makes the following findings: Claude W. Duke and Onan Corporation are legally responsible for the damages caused as a result of the carbon monoxide poisoning of Edwood S. Brodtmann. Claude Duke's responsibility results from the application of Civil Code Article 2317. Onan Corporation's responsibility results from its failure to meet its duty to warn of the danger posed by the generator it manufactured. The defendants are liable *in solido* for the damages sustained by plaintiffs. There was no comparative negligence on the part of the decedent, Edwood S. Brodtmann.

Regarding Claude Duke's claims, Onan Corporation is liable to Claude W. Duke for the damages he sustained as a result of the incident. Additionally, Duke's claims for contribution from Onan have been recognized and granted by the judgment rendered. The Court does not find negligence attributable to Mr. Duke. As indicated hereinafter, Onan failed in its duty to warn. The nipple in the exhaust elbow assembly was not a "maintenance" item (the inspection was called for was inadequate where failure occurred from the inside out). The evidence supports a finding that the Duke vessel was well maintained, "clean and tight". Shortly after the incident the generator was seen as clean and serviced properly. Externally it looked to be in very good condition. The minor deficiencies noted (a lack of a double hose clamp and a missing brace) were not proximate causes of the nipple failure.

The evidence further supports a finding that an exhaust system is basically an expendable system. They corrode and eventually require replacement. The nipple used in the exhaust elbow assembly was apparently expected to last from one major overhaul to another and should have been designed to last at least as long as the other components of the exhaus elbow assembly. Failing to achieve such objective, Onan then had a duty to warn.

Even if one does not accept that exhaust systems are expected to eventually require replacement, the material selected and used in pipe nipple which failed had a limited useful life. The standards considered and used by Onan in the material selection for the assembly provides that the material has a limited life. This nipple was a critical component of the exhaust system. A failure of this part would allow the escape of poisonous gas into a confined area where human presence was foreseeable. Based on information available, including material standards, Onan knew or should have known the nipple had a limited life. As indicated and supported by evidence, the issue was not whether it would "rust" away, but rather how long it would take. Despite this no

warnings of this fact and the dangerous risks posed by a failure were given.

The failed nipple on the "Peggy D", if not an "Onan" nipple, was of a type called for in Onan's specifications. If one accepts the assertions that the failed nipple was longer than recommended by Onan, the slight extra length of the nipple was insignificant and did not contribute to the failure. As previously noted the nipple was not described as an item requiring maintenance in the Onan's owner's manual. Onan simply called for inspections. The nipple was a relatively small component of the exhaust elbow assembly. When installed correctly only a small section of the nipple would be visible between other elbow assembly parts. The evidence supports a finding that the nipple failed from the inside out due to operating conditions which should have been anticipated and expected to be part of normal use. Further, this failure was not the result of a mechanical failure (stepping on the assembly or excess weight on the assembly resulting from inadequate bracing or support). Due to the location of the crack on the nipple and its failure from the inside out, a visual inspection was difficult and in this case useless.

This Court finds the exhaust assembly of Onan's MCCK generator to have presented a danger inherent with normal use. This danger was not within the knowledge of or obvious to an ordinary user. The product and supporting literature placed in commerce by Onan failed to warn adequately of this danger. As a result Onan is liable to plaintiffs for damages sustained as a result of the death of Edwood S. Brodtmann.

Damages awarded to the Brodtmanns is based on this being a very close family. Mr. & Mrs. Brodtmann were together for forty-one years. The testimony of the family members amply bears out the closeness of this family. Mr. Brodtmann was a loving husband and father. He was the center and literal head of the family. Until his untimely death, he was always there for any member of his family. He played an active role in all of their lives.

Damages awarded to Claude S. Duke are based on the physical effects of the October 11, 1989, incident and the perhaps more devasting emotional effects and resulting mental suffering. Mr. Duke awoke or possibly regained consciousness on that day to find himself along on his boat. His three companions all dead. After his rescue he was taken to the hospital. The changes to this once active man were dramatic and apparent. Initial shock and depression only got worse. He lost his desire to do anything. His lifestyle changed drastically and his memory failed. He also experienced Post Traumatic Stress Disorder.

READ, RENDERED AND SIGNED in open court at CHALMETTE, LOUISIANA, this 2nd day of May, 1995.

[s]JUDGE KIRK A. VAUGHN

A TRUE COPY
[s]LYNN R. TORRES
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

BY [s] SABRINA FOLSE
DEPUTY CLERK

MILLICENT CLESI BRODTMANN	*	NO. 96-CA-0257
WIFE OF EDWOOD S.	*	
BRODTMANN, ET AL	*	COURT OF
	*	APPEAL
	*	
VERSUS	*	FOURTH
	*	CIRCUIT
CLAUDE W. DUKE, KREMER	*	STATE OF
MARINE, INC., ONAN	*	LOUISIANA
CORPORATION AND LIBERTY		
MUTUAL INSURANCE CO., ET AL.		

APPEAL FROM THE
34TH JUDICIAL DISTRICT COURT,
ST. BERNARD PARISH
NO. 64, 669, DIVISION "D"
HONORABLE KIRK A. VAUGHN, JUDGE

****

PHILIP C. CIACCIO
JUDGE

****

(Court composed of Judge Steven R. Plotkin and Judge Charles R. Jones and Judge Philip C. Ciaccio)

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PATRICIA B. JUDICE
CHRISTOVICH & KEARNEY, L.L.P.
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AFFIRMED

Following a lengthy bench trial in this maritime suit for wrongful death, the trial court rendered judgment awarding compensatory damages to plaintiffs, but denied their claim for punitive damages. The trial court also awarded damages on a cross-claim against defendant, but denied the cross-claim for punitive damages. Plaintiffs and cross-claimant have appealed from this judgment, and defendant has answered the appeal, alleging several assignments of error regarding the imposition of liability and the assessment of damages. For the reasons stated more fully herein, we affirm the judgment of the trial court.

FACTS

On October 10 and 11, 1989, Edward Brodtmann, a 64-year old retired salesman, was a passenger aboard the M/V PEGGY D, which was owned and operated by Brodtmann's longtime friend, Claude W. Duke. Duke, Brodtmann and two other friends had planned an overnight fishing trip on Duke's thirty-seven foot cabin cruiser in Louisiana waterways. On

October 10, 1989, the men anchored the vessel in the area of Johnson Bay and Picnic Bayou in St. Bernard Parish. They then boarded three smaller fishing boats which were attached to the M/V PEGGY D for the purpose of fishing in the low-lying marshes. They returned to the M/V PEGGY D that evening and began to prepare dinner. During this time, Claude Duke retired to the wheelhouse, and his three companions remained in the cabin. Duke awoke the following morning and found his friends dead. He haled a passing vessel, the M/V MANIAC, which alerted the U.S. Coast Guard. It was subsequently determined that the three men died of carbon monoxide asphyxiation. Duke was transported to a hospital for medical examination and was released the same day.

Claude Duke purchased the M/V PEGGY D in 1968. At the time of purchase, the vessel was equipped with a marine gasoline generator manufactured by Onan Corporation (Onan) which was in place on the vessel at the time of this incident. Duke retained a mechanic to perform the required maintenance aboard the vessel.

As the incident occurred in the waterways of St. Bernard Parish, the St. Bernard Sheriff's Office began an investigation into the cause of this accident. The Sheriff's Office retained Gene Jackson, a marine surveyor, to determine whether the accident was caused by mechanical deficiencies. Following an inspection of the vessel, Mr. Jackson determined that an exhaust pipe nipple in the generator's exhaust elbow assembly had corroded and broken, thus allowing carbon monoxide gases to escape into the cabin areas of the vessel.

On October 8, 1990, Millicent Clesi Brodtmann, decedent's widow, and decedent's three adult children, Lisa Brodtmann Bruno, Edwood S. Brodtmann, Jr., and Richard H. Brodtmann, (hereinafter "plaintiffs" or "the Brodtmanns"), filed this wrongful death and survival action in the district court in St. Bernard Parish based on negligence principles. Plaintiffs originally named as defendants Claude Duke, the owner of the vessel,

and Kremer Marine, Inc., which had performed inspection and mechanical work on Duke's vessel. Kremer subsequently filed a third-party demand against Three B's Pump Company for failing to properly repair the generator and also against Onan Corporation, the manufacturer of the generator located on the M/V PEGGY D. Claude Duke also filed cross-claims against Kremer Marine and Onan Corporation for indemnity for the claims made against him by plaintiffs.

On May 1, 1992, plaintiffs filed an amended petition for damages naming as defendant Onan Corporation and its insurer, Liberty Mutual Insurance Company, alleging negligence and strict liability theories based on Onan's failure to properly design the generator against defects and for failure to warn of said defects. Plaintiffs further alleged that defendants Kremer Marine and Onan were guilty of gross, wanton and willful misconduct sufficient to warrant the imposition of punitive damages.

Claude Duke subsequently amended his cross-claim against Kremer Marine and Onan Corporation to allege a claim for personal injuries he sustained as a result of failure of the generator as well as a claim for punitive damages. Onan filed a reconventional demand against Duke for indemnity, alleging that Duke was liable for plaintiffs' injuries by failing to maintain his vessel. Onan also amended its answer to plaintiffs' petition to include aplea of comparative fault on the part of plaintiffs' decent, Edwood Brodtmann.

This matter was tried in a bench trial over a ten-week period. On May 2, 1995, the trial court rendered judgment awarding compensatory damages in favor of plaintiffs and against defendant, Onan. The trial court also rendered judgment in favor of Kremer Marine, dismissing plaintiffs' claims and the cross-claims of Duke and Onan brought against Kremer. the trial court further rendered judgment awarding compensatory damages in favor of Claude Duke on the basis of his cross-claim against Onan. The trial court dismissed plaintiffs' and Duke's claim for punitive damages.

PLAINTIFFS' AND DUKE'S APPEAL

Mrs. Brodtmann and the three Brodtmann children argue two assignments of error by their appeal: (1) that the trial court erred in failing to award punitive damages, and (2) that they are entitled to an award of pre-judgment interest in accordance with general maritime law. Claude Duke also appealed from the judgment of the trial court, asserting identical assignments of error as those urged by the Brodtmanns. Both the Brodtmanns and Duke will be referred to as plaintiffs in this section.

Applicable Law

Determination of the question of whether a tort is "maritime" and this within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 497, 34 LEd.2d 454 (1972). Generally, federal maritime jurisdiction is invoked whenever an accident occurs on navigable waters and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. Offshore Logistics v. Tallentire, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986).

Although the United States Constitution grants to federal district courts jurisdiction in all "cases of admiralty and maritime jurisdiction," state courts have concurrent jurisdiction by virtue of the "savings to suitors" clause of the Judiciary Act of 1789. U.S. Const., art. III, section 2; 28 U.S.C.A. section 1333. This case arose out of an incident on a vessel in navigable waterways and in furtherance of an activity bearing a significant relationship to traditional maritime activity, and although it falls within the federal admiralty jurisdiction, the Louisiana state court has concurrent jurisdiction over plaintiffs' claim.

Even though this maritime tort case was brought in state court, reference to admiralty law is necessary to determine the

rights and liabilities of the parties. Mayo v. Nissan Motor Corp. in U.S.A., 93-852, (La. App. 3rd Cir. 6/22/94) 639 So. 2d 773,writs denied, 95-0147, 95-0148, 95-1060 (La. 3/17/95) 651 So.2d 280, 281. In Green v. Industrial Helicopters, Inc., 593 So.2d 634, 637 (La. 1992), cert. denied, sub nom, Industrial Helicopters, Inc. v. Green, 506 U.S.819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992), the Louisiana Supreme Court stated:

> As a general proposition, '[a] maritime claim brought in the common law state courts...is governed by the same principles as govern actions brought in admiralty, i.e., by federal maritime law...Since the general maritime law is not a 'complete or all inclusive system,' a federal court may adopt state statutory law and common law principles as the federal admiralty rule. State law and regulations may also supplement federal maritime law when "there is no conflict between the two systems of law, and the need for uniformity of decision does not bar state action." (citations omitted.)

The court further explained that "a Louisiana state court should respect Louisiana law unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the general maritime law." Id., 593 So.2d at 638; Mayo v. Nissan Motor Corp., 639 So.2d at 784.

Punitive Damages

There is no dispute in the present case that punitive damages are not available under Louisiana substantive law based on the facts herein. Plaintiffs argue however that punitive damages are recoverable under general maritime law.

In the present case, the trial court denied plaintiffs' claim for punitive damages based on this Court's previous decision in Bridgett v. Odeco, 93-1536 (La. App. 4 Cir. 12/15/94), 646 So.2d 1249, 1254, writs denied 95-0381, 95-0398, (La. 3/30/95) 651

So.2d 840, in which a seaman filed suit for damages in state court under general maritime law against his Jones Act employer and against Odeco, the owner of the vessel on which he was injured. In his petition, plaintiff sought punitive damages against Odeco. Odeco responded with an exception of no cause of action, arguing that the general maritime law does not provide for awards of punitive damages. The trial court granted Odeco's exception and this Court affirmed, holding that punitive damages are no longer recoverable in this jurisdiction under the general maritime law.

In reaching this conclusion, the panel of this court relied on the benchmark decision of the United States Supreme Court in Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990). The specific issue in Miles was whether the unavailability under the Jones Act of damages for loss of society and lost future income precludes recovery of these damages under a general maritime law unseaworthiness claim. The court held that it does. In Miles, the high court held that based on uniformity principles, there is no right to a claim for loss of society under the general maritime law because there is no right to such under the Jones Act. As stated by this Court in Bridgett, the apparent intent of the Court in Miles was to impose a uniform rule on all actions for the wrongful death of a seaman, whether brought pursuant to federal legislation or under the general maritime law. Bridgett, supra, 646 so.2d at 1252. As non-pecuniary damages (including a claim for loss of society) are not recoverable under the Jones Act, they cannot be recovered under the general maritime law.

For many years prior to Miles, punitive damages had been recoverable as an appropriate remedy under general maritime law. In the wake of Miles, however, courts have been increasingly hesitant to allow punitive damages in certain general maritime actions involving personal injury or death. This court noted this fact in Bridgett, citing to several federal court

cases which have applied the principles set forth in Miles and have held that punitive damages are not available under the general maritime law. See, Miller v. American President Lines, Ltd., 989 F.2d 1450, 1459 (6th Cir.), cert. denied, 510 U.S. 915, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993); Anderson v. Texaco, 797 F.Supp. 531, 536 (E.D.La. 1992); Rollins v. Peterson Builders, Inc., 761 F. Supp. 943, 949-950 (D.R.I. 1991). The Bridgett opinion also cited to the Fifth Circuit decision in Guevara v. Maritime Overseas Corp., 59 F.3d 1493, 1512 (5th Cir.) cert. denied, 116 S.Ct. 706, 133 L.Ed. 2d 662 (1995) (en banc) and to the cases cited therein which held that punitive damages are now unavailable under the general maritime law.

Further, the court in Bridgett noted that only two Louisiana courts have concluded that punitive damages remain recoverable under general maritime law: this circuit in Mistich v. Pipelines, Inc., 609 So.2d 921 (La. App. 4th Cir.), writ denied, 613 So.2d 996 (La. 1992) cert. denied, sub noM, Brown & Root, Inc. v. Mistich, 509 U.S. 913, 113 S.Ct. 3020, 125 L.Ed.2d 709 (1993), and the Louisiana Third Circuit Court of Appeal in Ellender v. Texaco, Inc., 93-1803, (La. App. 1 Cir. 6/24/94); 640 So.2d 845, writ denied, 94-2339 (La. 9/30/94) 642 So.2d 883. The court in Bridgett found that these decisions represent anomalous interpretations of Miles, and a majority of the court en banc overruled the prior decision regarding the awarding of punitive damages in Mistich. This Court specifically held:

> Miles' wake is now clear: the great weight of law demonstrates that punitive damages are not [sic] longer recoverable under the general maritime law.
>
> Accordingly, we overrule the holding in Mistich. Punitive damages shall no longer be available to a plaintiff who brings an action under the general maritime law in a court subject to this court's jurisdiction.

On appeal of the decision of the trial court in this case, plaintiffs contend that this Court's previous holding in Bridgett is distinguishable from the instant case because the decedent here was not a seaman as was the plaintiff in Bridgett. Plaintiffs further argue that the basis for the holding in Miles and its progeny, including Bridgett, was to support the objective of uniformity between suits brought under the Jones Act and those brought under the general maritime law. As Mr. Brodtmann was not a seaman, plaintiffs contend that their claim is not affected by the provisions of the Jones Act and therefore the objective of uniformity is not meaningful. In other words, plaintiffs contend that the limitations of the federal statute do not affect their claim brought solely under the general maritime law, and as there is no federal legislation precluding punitive damages, the longstanding provisions of the general maritime law apply.

In support of their position that punitive damages are recoverable under general maritime law, plaintiffs cite CEH, Inc. v. F/V Seafarer, 70 F. 3d 694 (1st Cir. 1995), wherein the federal appellate court affirmed the district court's granting of punitive damages, citing a long line of federal cases in which punitve damages have been awarded in general maritime actions where defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others. Although these cited decisions pre-dated Miles, the First Circuit in CEH, Inc. v. F/V Seafarer found that the decision in Miles was inapplicable to a resolution of whether punitive damages are available under general maritime law because there is no federal legislation which precludes the recovery of such damages and there is therefore no overriding uniformity interest which was relied on in Miles.

We find the decision in CEH, Inc. v. F/V Seafarer is not controlling here. Further, we find this Court's holding in Bridgett is not distinguishable from the present situation. Although the plaintiff in Bridgett was a seaman vis-a-vis his employer and the

Jones Act legislation clearly applied, his claimfor punitive damages was brought against Odeco as owner of the vessel solely under the general maritime law. The plaintiff in Bridgett was not a seaman in his relationship with Odeco, and this Court in Bridgett specifically held plaintiff had no claim for punitive damages in his general maritime claim against Odeco. Under these circumstances, we conclude that the holding in Bridgett is directly applicable to the case before us, where plaintiffs brought a claim for punitive damages under the general maritime law for the death of a non-seaman.

While we recognize that punitive damages have long been available under the general maritime law, we are also cognizant of the changes in this area of the law over the last several years. Although plaintiffs rely on a decision from the First Circuit which refused to apply Miles to a claim for punitve damages brought under the general maritime law, we find the overwhelming weight of the jurisprudence in this jurisdiction to support this Court's decision in Bridgett.

In sum, we are bound by the specific holding of this Court in Bridgett v. Odeco which stated that punitive damages are not recoverable under the general maritime law to claims brought within our jurisdiction. We therefore find no error in the trial court's denial of plaintiffs' claim for punitive damages in this case.

Pre-Judgment Interest

By their second assignment of error, plaintiffs contend that the trial court erred in awarding legal interest from the date of judicial demand rather than from the date of the accident. Plaintiffs are correct that the awarding of pre-judgment interest from the date of loss is the rule under general maritime law. Mayo v. Nissan, supra, 639 So.2d 773, 789. Under the federal law, the trial court has the discretion to deny pre-judgment interest from the date of loss only when there are "peculiar circumstances" that would make it inequitable for the losing party to be forced to pay

pre-judgment interest. Noritake Co., Inc. v. M/V Hellenic Champion, 627 F.2d 724, 728 (5th Cir. 1980).

However, the determination of whether the plaintiff is entitled to pre-judgment interest initially depends on whether he recovers under federal or state law. Corliss v. Elevating Boats, Inc., 599 So.2d 434 (La. App. 4th Cir. 1992). Under federal law, pre-judgment interest is awarded from the date of judicial demand. LSA-R.S. 13:4203; Schackai v. Tenneco Oil Co., 436 So.2d 729, 735 (La. App. 4th Cir.), writ denied, 440 So.2d 759 (La. 1983).

In the present case, the trial court awarded interest from the date of judicial demand as is appropriate under state law, LSA-R.S. 13:4203. Onan, the manufacturer of the gasoline generator, was held liable to the Brodtmanns under theories of state law, specifically, the Louisiana Products Liability Act. There is no indication from the trial court's reasons for judgment that Onan was held liable under general maritime law. Further, Onan was held liable to Claude Duke on theories of state tort law. Under the circumstances presented here, we find that as the trial court based its award of damages on state law, the award of pre-judgment interest must also be based on state law. The general maritime law is not controlling here, and plaintiffs are not entitled to federal pre-judgment interest. We find no error of the trial court in its award of judicial interest from the date of judicial demand.

DEFENDANT'S APPEAL

By their appeal, Onan raises severl assignments of error which can be divided into four arguments:

1. The trial court erred in finding Onan liable based on the Louisiana Products Liability Act.
2. The trial court erred in failing to apportion fault to Claude Duke.

3. The trial court erred in awarding damages to Duke for emotional injuries and in the alternative, the damages awarded were excessive.

4. The damages awarded to Mrs. Brodtmann and the decedent's three adult children were excessive.

Evidentiary Errors

With regard to the trial court's finding of liability, Onan's first contention on appeal is that the trial court's judgment was a result of erroneously admitted evidence which clouded the record and prejudiced their case. Onan argues that the trial court erred in denying their motion to exclude evidence of other accidents which plaintiff sought to introduce. At trial, plaintiff introduced evidence in the form of pleadings, depositions, and testimony of witnesses relating to six previous incidents which occurred between 1973 and 1988 in which various plaintiffs made claims against Onan for a defect in a marine generator. The trial court heard arguments as to the relevance and admissibility of this evidence, and the court admitted into the record a portion of the evidence plaintiff sought to introduce. The remaining evidence was profferred by plaintiffs for purposes of this appeal.

Onan now argues that the trial court erred in allowing this evidence, which Onan contends is irrelevant and highly prejudicial, into the record. Thus, Onan argues, the judgment of the trial court is tainted and no weight should be accorded to it. Onan contends that on the basis of this evidentiary error, this Court must conduct an independent review of the record without deference to the trial court's findings and without reliance on the manifest error standard, citing McClean v. Hunter, 495 So.2d 1298 (La. 1986).

The trial court's decision to admit or exclude evidence is governed by the Louisiana Code of Evidence, specifically the following articles:

> La. C.E. art. 401
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> La. C.E. art. 402
> All relevevant evidence is admissible, except as otherwise provided by the Constituion of the United States, the Constitution of Louisiana, this Code of Evidence, or other legislation. Evidence which is not relevant is not admissible.
>
> La. C.E. art. 403.
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

Generally, a trial judge is accorded discretion under the above articles concerning the admission of evidence on the grounds of relevance, and the trial court's decision will not be reversed absent a finding of abuse of discretion. Dixon v. Winn-Dixie Louisiana, Inc., 93-1627, (La. App. 4 Cir. 5/17/94) 638 So.2d 306, 312. Louisiana courts have found that evidence of prior accidents is admissible for the limited purpose of showing that a thing or place was dangerous and the defendant knew of the dangerous condition. However, the prior accidents must be

closely related in circumstance to the injury or hazard at issue. Davis v. Louisiana Power & Light Co., 612 So.2d 235, 239 (La. App. 4 Cir. 1992), writ denied, 615 So.2d 336 (La. 1993), and citations therein. To be relevant, the other accident should occur at substantially the same place, and under substantially the same conditions and must be caused by the same or similar defect, danger, act or omission. Lee v. K-Mart Corp., 483 So.2d 609, 613 (La. App. 1st Cir. 1985), writ denied, 484 So.2d 661 (La. 1986).

In the present case, the trial court conducted a detailed and thorough examination of the evidence plaintiffs sought to introduce concerning these previous accidents. The trial judge stated on the record that he was only interested in evidence from the other accidents insofar as they related to the condition of the exhaust nipple and whether the injuries were sustained as a result of carbon monoxide inhalation. The trial court did not believe specifically related to the facts of the Brodtmann case.

We have carefully reviewed the record in this case, including the numerous offers of evidence and the trial court's rulings thereon, and find that the trial court limited the admitted evidence to facts specifically relating to the present accident, and specifically the condition of the nipple in the previous incidents and whether the injuries were cuased by carbon monoxide inhalation. Based on our review of the record in this case, we are unable to find an abuse of the trial court's discretion in the admission of evidence. Although we find that the proffered evidenceis not relevant to the facts of the case before us, we find the trial court's admission of limited evidence and testimony regarding the previous accidents involving Onan generators to be relevant and admissible.

Standard of Review

As we have found no abuse of the trial court's discretion in the admission of evidence, the standard of review is the well-established manifest-error rule set forth in Stobart v. State

through Dept.of Transp. & Development,617 So.2d 880, 882 (La. 1993):

> A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." Rossell v. ESCO, 549 So.2d 840 (La. 1989). This court has announced a two-part test for the reversal of a factfinder's determinations:
>
> 1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and
>
> 2) the appellate court must further determine that the record established that the finding is clearly wrong (manifestly erroneous).
>
> See. Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987).
>
> This test dictates that reviewing court must do more than simply review the record for some evidence which supports or controverts the trial court's finding. Id. The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.
>
> Nevertheless, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review whether conflict exists in the testimony.

We turn next to an examination of the record before us based on this well-settled principle of review.

Louisiana Products Liability Act.

Although plaintiffs' state court claim falls within the federal admiralty law which recognizes general theories of negligence, strict liability and products liability, Louisiana courts have applied the Louisiana Products Liability Act, LSA-R.S. 9:2800.51 et seq., as a supplement to the general maritime law. See, Mayo v. Nissan, 639 So.2d at 784. The trial court evidently found Onan liable based on LSA-R.S. 9:2800.57 which provides:

> A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.
>
> B. A manufacturer is not required to provide an adequate warning about his product when:
>
> (1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or
>
> (2) The user of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

> C. A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic, or who would have acquired such knowledge had he acted as a reasonable prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

In its reasons for judgment, the trial court made the following factual findings: 1) that the exhaust nipple manufactured by Onan in this case was a critical component of the exhaust system of the gasoline generator; 2) that the nipple had a limited useful life; 3) that it failed as part of its normal use by corroding from the inside out making inspection difficult; 4) that it constituted a danger inherent in its normal use; and 5) that the warnings provided by Onan regarding this danger were inadequate.

The trial court further stated as follows:

> As indicated hereinafter, Onan failed in its duty to warn. The nipple in the exhaust elbow assembly was not a "maintenance" item (the inspection [that] was called for was inadequate where failure occurred from the inside out)...The evidence further supports a finding that an exhaust system is basically an expendable system. They corrode and eventually require replacement. The nipple used in the exhaust elbow assembly was apparently expected to last from one major overhaul to another and should have been designed to last at least as long as the other components of the exhaust elbow assembly. Failing to achieve such objective, Onan then had a duty to warn.
>
> Even if one does not accept that exhaust systems are

> expected to eventually require replacement, the material selected and used in [the] pipe nipple which failed had a limited useful life. The standards considered and used by Onan in their material selection for the assembly provides that the material has a limited life. This nipple was a critical component of the exhaust system. A failure of this part would allow the escape of poisonous gas into a confined area where human presence was foreseeable. Based on information available, including material standards, Onan knew or should have know the nipple had a limited life. As indicated and supported by evidence, the issue was not whether it would "rust" away, but rather how long it would take. Despite this, no warnings of this fact and the dangerous risks posed by a failure were given..

The trial court thus made a factual finding that the exhaust nipple of Onan's generator presented a danger inherent in its normal use. The trial court further found that the danger was not readily discernible to the user because the nipple corroded from the inside out making inspection difficult.

Onan contends in brief that at the time of its design, the materials used in the exhaust nipple were state of the art and conformed to industry standards, and that plaintiffs failed to prove that there was an alternative design which would have prevented the harm here. However, the record contains conflicting expert testimony regarding the performance of the galvanized steel which was used as the material in the design of the nipple. Plaintiffs' materials expert, Dr. Robert Rose, testified that galvanized steel was an appropriate metal due to the high temperatures in the operation of the generator. Plaintiffs' metallurgist concurred in this opinion. Defendant's experts testified that galvanized steel was an appropriate material because the temperature of the generator never reached the high temperature

relied on by plaintiffs' experts and that galvanized steel conformed to all industry standards. Further, the record contains the testimony of several of Onan's employees who gave conflicting and varying statements as to the exhaust gas temperatures and the effects on the galvanized steel exhaust nipple.

The trial court apparently believed the opinions of plaintiffs' experts regarding the suitability of the material chosen by Onan and chose not to credit the testimony of Onan employees. We find the evidence in the record provides a reasonable factual basis for this determination. Although the record fails to conclusively prove that another material, namely stainless steel, would have prevented the corrosion of the nipple, the evidence certainly supports a finding that the galvanized steel nipple was capable of corroding at the temperature required to operate the generator. This finding is also supported by the evidence in the record that the nipple corroded in the same manner on previous occasions, presenting a hidden danger.

Onan argues that a manufacturer is not required to design a product with components that never fail or that will withstand abuse or lack of maintenance. Onan further argues that it should not be required to warn the user of dangers which are obvious to the end user. Although we do not dispute these statements, we fail to find these rules applicable in the present situation. The trial court found that the nipple in Onan's generator had a limited useful life and that it required replacement more frequently than other major components of the system. Further, the trial court made a factual determination that the nipple corroded from the inside out and made inspection for replacement purposes difficult. The danger to the user was therefore not an obvious one. Plaintiffs' expert Dr. Rose, testified that in order to inspect the condition of the nipple, the component would have to be removed from the exhaust system so that the interior of the nipple could be examined. Although Onan was not required to design a component which never failed, if the component which is pro-

vided has a limited useful life and inspection is rendered difficult under normal use, Onan has a duty to warn the user of the foreseeable harm. Onan failed to do so, and the record reasonably supports the trial court's factual determination.

The trial court made a factual determination that the warnings provided by Onan were inadequate to warn of the danger inherent in the use of this generator. Although Onan warned that failure to provide necessary maintenance would cause damage to the plant, Onan failed to warn specifically that the exhaust nipple begins to corrode from the inside and failure to replace this component would result in emission of deadly carbon monoxide gases. In fact, the owner's manual did not contain reference to the exhaust nipple and the necessity to replace it before it fails. Our review of the record reveals a reasonable basis for the trial court's determination that Onan's warnings regarding this danger were inadequate.

Likewise, we find no merit in Onan's argument that it should be relieved of liability here because Duke admitted he did not read the owner's manual, and that therefore any enhanced warnings would have been futile. We find that the record in this case indicates that Onan was aware from previous accidents that the exhaust nipple on this generator corroded from the inside out and allowed the emission of carbon monoxide gases. Based on this knowledge, Onan had a further duty to inform end users of the danger inherent in the use of its generator, either by a recall or a letter to end users. Although Onan possessed or should have possessed the knowledge that the nipple when left unchecked presented a danger which could cause loss of human life,Onan failed to take steps to warn the end user of this danger. The trial court found Onan liable for this failure, and we find no manifest error in this determination.

Accordingly, we find a reasonable factual basis for the trial court's determination that Onan is liable for plaintiffs' damages based on the provisions of the Louisiana Products

Liability Act. We find no manifest error in the trial court's determination, and we affirm the trial court's finding of liability on the part of the manufacturer.

Duke's Negligence

Defendant next contends that the trial court erred in failing to apportion any fault to Claude Duke. Defendant contends that Duke was negligent in failing to adequately maintain the generator and in failing to inspect and replace the exhaust nipple as needed. Defendant argues that the condition of the generator on Duke's vessel was in violation of marine standards as well as Onan's instructions and warnings. Further, defendant contends that Duke was negligent in failing to read the Onan manual which was provided to him at the time he purchased the vessel.

As Duke was the onwer of the vessel on which this accident occurred, the trial court found Duke liable for plaintiffs' damages under the strict liability provisions of La. C.C. art. 2317. However, the court found that Duke was not negligent in the cause of this accident. In his reasons for judgment, the trial court relief on the finding made by Gene Jackson of the St. Bernard Parish Sheriff's Office that the vessel was well-maintained, "clean and tight." The court further noted that shortly after the incident the generator was seen as clean and serviced properly. Further the court found that the minor deficiencies found by Gene Jackson (a lack of a double hose clamp and a missing brace) were not proximate causes of the accident. Gene Jackson testified at trial that Duke's vessel was in excellent condition and it appeared to be serviced on a regular basis.

We find the trial court's determination to be supported by the record. Although Claude Duke had over forty years worth of boating experience, the record supports the trial court's finding that the exhaust nipple on the Onan generator corroded from the inside out, and that visual inspection would not necessarily

indicate that the part needed to be replaced. Even assuming that Duke was negligent in failing to read the generator manual, such failure was not a cause of the accident here. There was nothing in the manual to indicate that this part had a limited useful life or that it would corrode from the inside out making inspection difficult. Further, there was nothing in the manual to indicate that upon failure, the nipple would allow deadly carbon monoxide gases to escape from the generator.

The record shows that Claude Duke, with the assistance of a certified mechanic, adequately inspected and maintained his vessel. Shortly after the incident, the vessel was found to be in good condition. We find no manifest error in the trial court's determination that Claude Duke was not negligent in causing the accident on his vessel.

General Damages

The trial court awarded decedent's widow, Millicent Brodtmann, $500,000.00 in general damages. Mrs. Brodtmann was also awarded $100,000.00 for lost economic benefits as a result of her husband's death. Further, the trial court awarded $150,000.00 in general damages to each of Mr. Brodtmann's three adult children. Defendant contends that these awards are excessive and must be reduced.

"[T]he discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court shoud rarely disturb an award of general damages...It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. Young v.Maritime Overseas Corp., 623 So.2d 1257 (La. 1993), cert. denied, Maritime Overseas Corp. v. Young, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

In deciding whether a trial court award was excessive,

reviewing courts must first consider the individual circumstances of the subject case to determine whether the trial court abused its much discretion in setting the award. Bernard v. Royal Ins. Co., 586 So.2d 607, 612-613 (La. App. 4th Cir.), writ denied, 589 So.2d 1058 (La. 1991). Only after determining that the award in the subject case was improper may the reviewing court consider awards in similar cases. Amedee v. Cruse, 526 So.2d 433 (La. App. 4th Cir. 1988). The reviewing court may then increase or reduce the award only to the lowest or highest award which would have been within the trial court's discretion. Id.

The trial court found that the Brodtmanns were a very close family. The court noted that Mr. and Mrs. Brodtmann were together for forty-one years. The court determined that Mr. Brodtmann had been a loving husband and father and that he was the center and literal head of the family. Mr. Brodtmann played an active role in the lives of his wife and three children.

Obviously, the trial court was very impressed by the testimony of Mrs. Brodtmann and the Brodtmann siblings regarding the effect of Mr. Brodtmann's death on the quality of their lives. The death of their husband and father in such a tragic and untimely fashion caused great despair in each of the plaintiffs. Mrs. Brodtmann testified that after her husband retired, he assisted her in the care of her elderly family members and was a good companion to her. Although the Brodtmann children are adults and were not dependent upon their father for financial support, they each testified that he was a great source of emotional support to them. We believe that under these circumstances, the awards made by the trial court are within the sound discretion of the trial court. Although some may find the awards to be on the high end of the scale, we cannot say that the awards are out of proportion or constitute an abuse of the trial court's discretion. We must therefore affirm the awards of general damages made to the plaintiffs in this case.

With regard to the court's award of loss in economic

benefits to Mrs. Brodtmann, defendant argues that the testimony of plaintiffs' economic expert, Dr. Melville Wolfson, was erroneous and economically unreliable. Dr. Wolfson opined that Mrs. Brodtmann's loss in economic benefits as a result of her husband's death was approximately $205,000.00. Defendant relies on the testimony of its own expert, Dr. Kenneth Boudreaux, who testified that the highest loss of economic benefit which Mrs. Brodtmann could have sustained based on her husband's age and other factors was approximately $48,000.00. When expert witnesses present conflicting testimony, the trial court's determination of which expert is more credible should not be reversed absent a showing of manifest error. Sistler v. Liberty Mutual Ins. Co., 558 So.2d 1106 (La. 1990). We have thoroughly reviewed the testimony of both witnesses and their supporting evidence, and we find no manifest error in the trial court's award of $100,000.00 to Mrs. Brodtmann for economic loss.

Damages awarded to Claude Duke

Defendant argues that there is no legal basis for the award of damages to Claude Duke, and in the alternative, that the trial court's award of $200,000.00 is excessive. In his reasons for judgment, the trial court stated:

> Damages awarded to Claude Duke are based on the physical effects of the October 11, 1989, incident and the perhaps more devastating emotional effects and resulting mental suffering. Mr. Duke awoke or possibly regained consciousness on that day to find himself alone on his boat. His three companions all dead. After his rescue he was taken to the hospital. The changes to this once active man were dramatic and apparent. He lost his desire to do anything. His lifestyle changed drastically and his memory failed. He also experienced Post Traumatic Stress Disorder.

Defendant argues that there is no legal basis for Duke's recovery under the facts presented in this case. Defendant contends that although Louisiana law recognizes bystander recovery pursuant to La. C.C. art. 2315.6, the federal law has refused to grant recovery to a bystander for purely emotional injuries. See, Gaston v. Flowers Transportation, 866 F.2d 816 (5th Cir. 1989). As Louisiana law conflicts with federal law, defendant argues that state law cannot supplement the general maritime law to provide Duke with a remedy. See, Green v. Industrial Helicopters, Inc. 593, So.2d at 637.

We find no merit in this argument, however, Duke's claim for damages is not a bystander case, where the plaintiff only viewed the accident or came on the scene shortly thereafter, but rather one in which Duke was a victim in the accident and allegedly suffered both physical and mental injuries as a result. Under the general maritime law, recovery has been allowed for emotional injuries where the plaintiff suffered physical impact and tangible physical injuries. Gough v. Nat. Gas Pipeline Co. of America, 996 F.2d 763 (5th Cir. 1993). Further, under state law, a participant in an accident is entitled to recover any damages sustained as a result of an injury, whether physical or mental or both. Morris v. Maryland Cas. Co., 94-1556, (La. App. 3 Cir. 5/3/95) 657 So.2d 198. Under the circumstances of this case, the recovery under state law may therefore supplement the general maritime law, and the state court may therefore supplement the general maritime law with the state law. The basis of Duke's recovery therefore was general Louisiana tort law.

We turn next to the extent of damages suffered by Duke, who at the time of the accident was 84 years of age. Mrs. Duke testified that prior to this incident her husband was a very social, outoing person who enjoyed boating and sporting activities. She stated that although he was semi-retired, he continued to practice law and to be very active on a daily basis. After this incident, Mrs.

Duke testified that her husband became very depressed and sedentary and refused to see friends or go out. She stated he stopped going to his office and no longer went out on his boat.

Dr. Frank Liebkemann, a close personal friend and neighbor of Duke's who saw him almost every day, testified that prior to this incident Duke was very active and outgoing. After the accident Duke was very depressed and shaken.

Dr. George Murphy, an internist who examined Duke in the hospital on the date of the accident, testified that Duke appeared to be dazed and confused and that his blood gases indicated a significant exposure to carbon monoxide. Dr. Murphy indicated that the blood gas result had been apparently lost by the hospital, which is why the hospital did not have a record of Duke's carbon monoxide levels.

Dr. William Gassparini, a clinical psychologist who examined Duke in December of 1992 and again in October of 1994, testified that he obtained a history from Duke and performed a psychological test on him in 1992. Dr. Gassparini testified that Duke was suffering from organic brain symdrome and post traumatic stress disorder which he attributed to the inhalation of carbon monoxide and the death of his three friends on his vessel in 1989. Dr. Gassparini stated he found Duke to be depressed and to have had a decline in his cognitive abilities and his perceptual-motor abilities. Dr. Gassparini testified that he believed that Duke's condition was a result of the accident on his vessel, including the physical injury of the inhalation of carbon monoxide and the emotional injury of finding his three companions dead on his vessel.

The assessment of damages is within the sound discretion of the trial court. Young, supra, 623 So.2d 1257. The evidence in the record is sufficient to support a finding that Duke suffered some degree of carbon monoxide poisoning at the time of the incident. Further, the record supports the trial court's determination that the accident on his boat severly affected

Duke's personality. The trial court found that Duke suffered from post traumatic stress disorder, and we find that the record supports this finding. Although the award of $200,000.00 for this type of injury to this plaintiff may be considered by some to be high, we are unable to find that the award is an abuse of the trial court's discreation. Accordingly, we will not disturb the damage award rendered in favor of Claude Duke.

CONCLUSION

Accordingly, for the reasons assigned herein, the judgment of the trial court is affirmed. Each party is to bear its own costs of this appeal.

AFFIRMED.

THE SUPREME COURT OF THE STATE OF LOUISIANA

MILLICENT CLESI BRODTMANN, WIFE
OF EDWOOD S. BRODTMANN, ET AL

VS, NO. 98-C - 0658

CLAUDE W. DUKE, KREMER MARINE, INC.
ONAN CORPORATION AND LIBERTY MUTUAL
INSURANCE CO., ET AL

IN RE: Duke, Claude W.; - Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. Bernard 34th Judicial District Court Div. "D" Number 64, 669; to the Court of Appeal, Fourth Circuit, Number 96CA-0257

April 24, 1998

Denied.

CDK
BJJ
JPV
CDT
JTK

CALOGERO, C. J. would grant the writ.
MARCUS, J. on on panel
LEMMON, J. would grant the writ.

Supreme Court of Louisiana
April 24, 1998

[s] CLERK OF COURT FOR THE COURT

(2)

FILED
OCT 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 98-489

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MILLICENT CLESI BRODTMANN, WIFE OF
EDWOOD S. BRODTMANN, ET AL
Petitioners

versus

CLAUDE W. DUKE AND KREMER MARINE, INC.,
ONAN CORPORATION and CUMMINS ENGINE CO.
Respondents

On Petition for Writ of Certiorari to the
Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are punitive damages available in a *Moragne* death action brought by survivors of a *Calhoun*-type non-seafarer[1] who died in state territorial waters?

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[1]"Non-seafarer" is meant in the context used by this Court in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 n.2 (1996) as persons who are neither seamen covered by the Jones Act, 46 U.S.C. §688 (1988 ed.) nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq.

RULE 29.6 STATEMENT

Subsidiaries and Affiliates

Respondent Onan Corporation is a wholly owned subsidiary of Cummins Engine Company, Inc. Onan Corporation has no nonwholly owned subsidiaries.

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CEH v. F/V SEAFARER, 70 F.3d 694 (1st Cir. 1995) .3, 19, 20

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Frazer v. City of New York, 659 N.Y.S.2d 23 (N.Y.Sup. 1997) 25

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Hollinger v. Kirby Tankships, Inc., 910 F.Supp. 571 (S.D. Ala. 1996) 18, 22, 25

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Jones v. Compagnie Generale Maritime, 882 F.Supp. 1079 (S.D. Ga. 1995) 19

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Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir. 1984), *cert. den.*, 471 U.S. 1136 (1985) 24

LaVoie v. Kualoa Ranch and Activity Club, Inc., 797 F.Supp. 827 (D. Haw. 1992) 18

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Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913) 23

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317 (1990) ..... *passim*

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Penrod Drilling Corp. v. Williams, 868 S.W.2d 294 (Tex. 1993) 17

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Shield v. Bayliner Marine Corp., 822 D. Conn. 1993) 21

Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (5th Cir. 1985), *cert. den.*, 475 U.S. 1019 (1986) 11

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Sky Cruises, Ltd. v. Andersen, 592 So. 2d 756 (Fla. App.), *cert. den.*, 506 U.S. 975 (1992)	17
Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir. 1993)	20
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The Tungus v. Skovgaard, 358 U.S. 588 (1959)	9

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Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (2d Cir. 1993), *cert. den.*, 510 U.S. 1114 (1994) 18, 21, 24, 27

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46 U.S.C. § 688 8

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LSA-C.C. art. 2315.4 4

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Other Authorities:

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U. Colella, *The Proper Role for Special Solicitude in the General Maritime Law*, 79 Tul. L. Rev. 227 (1995) 11

Thomas M. DiBiagio, *Fostering Uniform Substantive Law and Recovery B The Demise of Punitive Damages in Admiralty and Maritime Personal Injury and Death Claims*, 25 U. Balt. L. Rev. 1 (1995) 6, 27

Robert Force, *Post-Calhoun Remedies for Wrongful Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L.J. 7 (1996) 12

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 10/11, 1989, decedent, Edwood S. Brodtmann and three friends were passengers aboard the recreational vessel, M/V PEGGY D, for an overnight pleasure fishing voyage. Brodtmann died aboard the M/V PEGGY D as it was anchored in Louisiana state waters. The coroner declared that the cause of Brodtmann's death was carbon monoxide asphyxiation.

On October 8, 1990, petitioners, Millicent Clesi Brodtmann and her three adult children (Brodtmann), filed their suit for wrongful death and for punitive damages. Respondent, Onan Corporation (Onan), manufactured the twenty-two year-old 6.5 kilowatt marine generator aboard the PEGGY D. Brodtmann's suit claimed that liability for the death of their loved one rested with Onan. Brodtmann argued that Onan's product was flawed by a design defect and/or inadequate warnings associated with the galvanized steel exhaust pipe nipple that connected the generator exhaust elbow assembly to the manifold. More germane to this petition, Brodtmann argued that Onan was guilty of gross, wanton and willful misconduct sufficient to warrant the imposition of punitive damages under the general maritime law.

In pretrial motions, Onan requested the trial court to rule that the general maritime law governed the Brodtmann claims and to therefore dismiss all claims for nonpecuniary damages, including Brodtmann's punitive damages claim. The trial court denied the motion.

The trial court proceeded with a bench trial over a ten-week period in 1994. Over Onan's objection, the court admitted evidence of other incidents involving Onan marine generators. As a result, Onan faced trial upon multiple claims spanning a period of two decades rather than upon the *Brodtmann* casualty alone. The trial record is thus an amalgamation of evidence directly bearing on the *Brodtmann* casualty, and evidence of five prior lawsuits and one verbal incident report to Onan, including testimony from five accident victims, four experts, twenty depositions of witnesses with no personal knowledge of the *Brodtmann* casualty, and scores of pleadings and discovery relating to the prior incidents.

On May 2, 1995, the trial court rendered Judgment awarding compensatory damages in favor of Brodtmann and against Onan. Under the direction of *Bridgett v. Odeco, Inc.*, 646 So.2d 1249, 1253-54 (La. App. 4th Cir. 1994), *writ den.*, 651 So.2d 840 (La. 1995), the trial court dismissed Brodtmann's claim for punitive damages.

Brodtmann filed a Motion for New Trial, asserting that their decedent's status as a non-seafarer distinguished this case from *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990) and its progeny, and thus made available to them punitive damages under general maritime law. The trial court denied the motion for new trial on May 16, 1995.

Brodtmann again challenged the punitive damages judgment in an appeal filed with the intermediate Louisiana appellate court. Brodtmann once more argued that their decedent's non-seafarer status exempted them from the special solicitude and uniformity principles of the general maritime law, most recently stated in *Miles* and its progeny, and thus made available their recovery of general maritime law punitive

damages. In considering the merits of the punitive damages appeal, the appellate court first acknowledged that punitive damages are not available under Louisiana substantive law based on the fact herein. The court then proceeded to analyze the issue under the general maritime law.

The appellate court explored its previous *en banc* decision in *Bridgett v. Odeco, Inc.*, *supra*, which counseled that punitive damages liability is foreclosed under the general maritime law without regard to questions of status. The Court of Appeal also examined this Court's benchmark decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), noting that the overwhelming weight of the jurisprudence, including decisions of the Fifth and Sixth Circuit Courts of Appeals, support the application of *Miles'* uniformity principles to bar punitive damages liability under general maritime law. The court flatly rejected the decision of the First Circuit Court of Appeals, in *CEH, Inc. v. F/V SEAFARER*, F.3d 694 (1st Cir. 1995), which permitted a general maritime law punitive damages claim, finding it unsound:

> While we recognize that punitive damages have long been available under the general maritime law, we are also cognizant of the changes in this area of the law over the last several years. Although plaintiffs rely on a decision from the First Circuit [*CEH*] which refused to apply *Miles* to a claim for punitive damages brought under the general maritime law, we find the overwhelming weight of the jurisprudence in this jurisdiction to support this Court's decision in *Bridgett*.

Brodtmann, 708 So.2d at 454. On February 11, 1989, the Louisiana intermediate appellate court issued its Opinion rejecting the Brodtmann arguments. *Brodtmann v. Duke, et als.*, 708 So.2d 447 (La. App. 4th Cir. 1998).

Brodtmann for a third time challenged the punitive damages judgment in a writ of certiorari and/or review filed with the Louisiana Supreme Court. Brodtmann again urged that their decedent's status as a non-seafarer made the teachings of *Miles* and its progeny irrelevant to their general maritime law punitive damages claim. On April 24, 1998, the Louisiana Supreme Court denied the writ of review and/or certiorari. *Brodtmann v. Duke, et als.*, ___ So.2d ___ (La. 1998).

There is no dispute in the present case that punitive damages are not available under Louisiana substantive law based on the facts herein.[2] And as detailed below, there is no cause for this Court's review of the punitive damages contention, which has been rejected by not only the state courts here involved, but also by courts nationwide in the wake of *Miles*.

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[2]Punitive damages may not be recovered in any action under Louisiana law unless expressly authorized by statute. *International Harvester Credit Corp. v. Seale*, 518 So.2d 1039, 1041 (La.1988). At the time of the *Brodtmann* casualty, punitive damages were allowed by Louisiana statutes only under two scenarios. They were recoverable when injuries were incurred as a result of wanton or reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances (former LSA-C.C. art. 2315.3 (repealed)) and when injuries were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle causes injury (LSA-C.C. art. 2315.4). The causes of action alleged against Onan did not state a claim for the recovery of punitive damages under either Article 2315.3 or 2315.4.

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 of the Rules of the Supreme Court of the United States. A petition for a writ of certiorari will be granted only for compelling reasons. Rule 10. This Petition and the issues presented therein satisfy none of the criteria for the Supreme Court to grant certiorari.

Since this Court's decision in *Miles v. Apex Marine, Corp.*, 498 U.S. 19 (1990), nearly every court facing the issue of punitive damages recovery under general maritime law has worked toward its elimination, thus fostering the uniform nationwide body of maritime law this Court envisioned in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Using the federal maritime statutes as a guide, the national jurisprudence has moved consistently toward a body of law which disavows the existence of a federal maritime punitive damages remedy, regardless of whether the accident occurs within territorial waters or on the high seas, and regardless of whether the victim is a maritime worker or recreational boater.

The lower state courts in this case ruled that punitive damages are unavailable as a matter of general maritime law, and are equally unavailable under Louisiana law given the facts of this case. This decision is consistent with the uniformity concerns of *Moragne* and *Miles*, and with a series of later decisions from the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits and with those from the vast majority of federal district courts nationwide. The decision below also follows the defining principles of the general maritime law -- special solicitude and uniformity.

Miles precludes recovery of punitive damages in causes of action created by the judiciary as well as by statute. *Miles* eliminates the availability of punitive damages for fatal injuries to seamen. Uniformity of an ordered system of maritime substantive law and recovery dictates that punitive damages should also be barred in personal injury actions arising from non-fatal injuries to seamen. Special solicitude further dictates that because punitive damages are denied to seafarers, they must likewise be denied in actions involving death or injury of non-seafarers. In fact, it would be incongruous to permit the recovery of punitive damages in actions arising from the death or injury of non-seafarers, but to deny the same remedy to seafarers. Uniformity also demands that recovery under the judicially created maritime law injury and death actions be no greater than recovery under the maritime statutes.[3]

If reversed, this decision will sound the death knell to the fundamental concepts of maritime law -- uniformity and special solicitude -- this Court has spent decades creating. For these reasons and those which appear below, petitioners' claim that the courts below erred in denying them punitive damages warrants no further review.

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[3]*See* Thomas M. DiBiagio, *Fostering Uniform Substantive Law and Recovery – The Demise of Punitive Damages in Admiralty and Maritime Personal Injury and Death Claims*, 25 U. Balt. L. Rev. 1 (1995).

ARGUMENT

A. Punitive damages are unavailable in post-*Miles* general maritime law wrongful death actions.

Two objectives -- special solicitude and uniformity -- have shaped the face of maritime personal injury and death law. *Trueheart v. Blandon*, 672 F.Supp. 929, 936 (E.D. La. 1987) (emphasis added) (citing *Moragne*, 398 U.S. at 386-87).

1. *The maritime law wrongful death remedy in coastal waters.*

The maritime wrongful death saga begins with the decision of this Court in *The Harrisburg*, 119 U.S. 199 (1886), where a seaman was killed when his ship collided with another vessel in coastal waters off Massachusetts. His heirs brought suit against the offending vessel for wrongful death, relying on the general maritime law. No federal maritime statutes were in force at that time, and many or most of the states followed the English common law rule precluding recovery for wrongful death under any circumstance. This Court rejected the plaintiff's claim reasoning that, absent a statute, there was no action for wrongful death at common law and, therefore, there was no such action in the maritime setting.

Undeterred by the harshness of *The Harrisburg*, the courts sought alternative avenues of relief wherever possible. As states began enacting wrongful death statutes,[4] admiralty courts

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[4]For deaths which occurred on the high seas, recovery could only be pursued under a limited number of state wrongful death statutes. *The Hamilton*, 207 U.S. 398 (1907). Because very few state statutes were interpreted to apply on the high seas, most deaths on the high seas did not

tempered the harshness *The Harrisburg* of by utilizing state wrongful death remedies.[5] But the infusion of state laws further complicated maritime tort litigation. Some state statutes permitted recovery for maritime deaths; others did not. Therefore, as the maritime death evolved, differing substantive laws would apply and different remedies would be awarded, based solely on the fortuitous location of the injury.

Aware of these inequities, Congress took steps toward effectuating a uniform system of maritime recovery by enacting two statutes affording recovery for wrongful death. In 1920, Congress passed the Death on the High Seas Act (DOHSA), which created a wrongful death remedy for deaths more than three miles from shore.[6] In that same year, Congress also passed the Jones Act, which provides a wrongful death claim to the survivors of seamen killed in the course of their employment, whether on the high seas or in coastal waters.[7] Congress also enacted, in 1927, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), which granted death benefits to

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permit a cause of action. *Moragne*, 398 U.S. at 393 n.10.

[5]Years before *The Harrisburg*, this Court side-stepped the problem of whether the general maritime law itself would recognize a wrongful death action, preferring instead to permit recovery pursuant to state statute. *Steamboat Co. v. Chase*, 83 U.S. 522 (1873). *But see Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) (precluding application of a New York state workmen's compensation statute to a longshoreman on board a vessel docked in navigable waters as an unconstitutional invasion of federal interests).

[6]46 U.S.C. §§761-768 (1988 ed.).

[7]46 U.S.C. §688 (1988 ed.).

longshoremen and harbor workers killed in the course of their employment.[8]

Although these statutes made significant inroads toward maritime uniformity, they did not apply, on their face, to the death of non-seafarers in territorial waters. Brodtmann construe Congressional silence in the coastal waters as preserving to non-seafarers greater remedies than those afforded to seafarers. That Brodtmann misunderstand and grossly underestimate Congressional inaction is evident from this Court's unanimous opinion in *Moragne v. States Lines Marines, Inc.*, 398 U.S. 375 (1970).[9]

By the late 1960s, nonuniform rules of recovery permeated federal maritime law, especially in the wrongful death context. Fatal accidents on the high seas had an adequate federal

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[8]33 U.S.C. §§901, et seq. (1988 ed.). In 1972, Congress amended the Act by permitting a statutory cause of action for negligence against a vessel, including a remedy for wrongful death. 33 U.S.C. §905(b).

[9]In *Moragne*, this Court interpreted Congressional silence in coastal waters as symbolic of Congress' approval of the adequacy of state law remedies to effectuate the substantive duties imposed by general maritime law. 398 U.S. at 397-98. This Court had earlier affirmed this practice in *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), concluding that extending state wrongful death statutes to fatal accidents in coastal waters was compatible with substantive maritime policies: "The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 242. It reaffirmed this practice in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), wherein a unanimous Court approved the application of state law to the wrongful death of a non-seafarer in territorial waters, which would have otherwise been without remedy under *The Harrisburg*. *See also Hess v. United States*, 361 U.S. 314 (1960) (same).

remedy, while the same accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest state. The potential existed for as many different remedies (or no remedy at all) as there would be states addressing deaths on their territorial waters. *Id.* at 395-96.

This Court finally dealt a death blow to *The Harrisburg* in *Moragne, supra*, which involved an unseaworthiness claim asserted by the widow of a longshoreman killed in Florida's territorial waters. Because the law of Florida did not provide for a wrongful death action based on unseaworthiness, the widow's claim was barred by the rule of *The Harrisburg*. Justice Harlan, writing for a unanimous Court, overruled *The Harrisburg* and held that a general maritime wrongful death action would "assure uniform vindication of federal policies." 398 U.S. at 402. By aligning the general maritime law with the policies embodied in the DOHSA, the Jones Act, and state statutory schemes, the *Moragne* Court for the first time furthered the twin aims of general maritime law, special solicitude and uniformity.

Justice Harlan understood that the function of "special solicitude" had shifted from that which counseled *The Sea Gull*'s[10] invocation of the "humane and liberal" character of the maritime law. In the words of *Moragne*, "[a] development of major significance ha[d] intervened," to wit, the enactment of a federal maritime personal injury and wrongful death statutory scheme. 398 U.S. at 388. The Jones Act, DOHSA, and LHWCA (coupled with state wrongful death statutes) protected many, if not all, of those previously left without remedy under the general maritime law. The solicitude extended in *Moragne* was measured, reaching only as far as uniformity permits by keeping the general maritime law true to policies embodied in

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[10] 21 F.Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578).

federal legislation.[11] *Moragne* confirmed that admiralty courts can update the general maritime law to the extent it lags behind federal policy judgments. As a result, the facts of *Moragne* (longshoreman killed in state waters) compelled the conclusion that wrongful death recovery under the general maritime law was a proper extension of the policy according special solicitude to those who make a living upon the sea.

Justice Harlan's brief discussion of special solicitude foreshadowed the main thrust of *Moragne*: creating a general maritime wrongful death action that would restore uniformity to federal maritime law. The central feature of *Moragne* is that by creating a wrongful death action under the general maritime law, the Court restored a uniform rule that furthered "federal

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[11] *See* U. Colella, *The Proper Role for Special Solicitude in the General Maritime Law*, 79 Tul. L. Rev. 227, 261-64 (1995). With two exceptions, this Court has remained faithful to this view of special solicitude. *See Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974) (holding that beneficiaries of longshoremen killed in state territorial waters can recover loss of society damages, even though seamen and those injured on the high seas cannot); *American Export lines, Inc. v. Alvez*, 446 U.S. 274 (1980) (extending *Gaudet* to longshoremen injured in state territorial waters).

Gaudet was decided by the barest of majorities and had soon been eroded to the point where its continued vitality was cast in doubt. *See, e.g., Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. den.*, 475 U.S. 1019 (1986); *Truehart v. Blandon*, 672 F.Supp. 929 (E.D. La. 1987). This Court eliminated all doubt about *Gaudet* in *Miles*, wherein it held that the survivors of a seaman killed in territorial waters could not supplement their Jones Act recovery by obtaining loss of society damages under *Gaudet*. In so ruling, the Court stated, "[t]he holding of *Gaudet* applies only in territorial waters and applies only to longshoremen." *Miles*, 498 U.S. at 31. As the Sixth Circuit recently stated in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993), "[*Gaudet*] has therefore been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled."

policies." 398 U.S. at 401. The Court achieved this goal by aligning the general maritime law with the policies embedded in DOHSA and the Jones Act. The Court insisted that the general maritime law be uniform with federal policy regarding wrongful death, which also happened to coincide with the policy of all fifty states. This action created bottom-line uniformity in maritime law – even in the absence of state wrongful death remedies, all beneficiaries had a wrongful death remedy available under maritime law.[12] *Moragne* also rejected a maritime recovery scheme that would fortuitously single out for special compensation any victim of wrongful conduct. The *Moragne* Court thus provided lower courts with a workable definition of uniformity as it relates to maritime personal injury and death actions under the general maritime law.

The uniformity sought by *Moragne* was emphasized in this Court's unanimous opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which also subscribes to the proper view of special solicitude. In *Miles,* the nondependents of a seaman brought a negligence claim under the Jones Act and a *Moragne* claim based on the vessel's unseaworthiness. In addition to pecuniary damages available under the Jones Act, the complaint asked for non-pecuniary damages under *Moragne,* as supplemented by *Gaudet.* The Court denied the broader recovery, emphasizing once more that the vindication of maritime policies demands uniformity of maritime remedies.[13] The *Miles* Court reasoned that its decision restored "a uniform rule applicable to all actions for the wrongful death of a seaman,

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[12]*See* Robert Force, *Post-Calhoun Remedies for Wrongful Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L.J. 7, 37 (1996).

[13]498 U.S. at 32.

whether under DOHSA, the Jones Act, or general maritime law." 498 U.S. at 33.

In *Miles*, this Court once more insisted that the general maritime law should be uniform with federal policy regarding wrongful death. The Court harmonized the Jones Act and general maritime law with DOHSA, which expressly disallows recovery for nonpecuniary damages.[14] In barring recovery of nonpecuniary damages, *Miles* circumscribed the power of the admiralty judge to expand remedies under the general maritime law in a way that undermines congressional policy judgments. 498 U.S. at 32-33. The *Miles* Court explained:

> [A]n admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and admiralty courts must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Id. at 27, 31-32. *Miles*, then, heralds a move toward greater uniformity between maritime law and its statutory analogs.[15]

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[14] *See* 46 U.S.C. §762.

[15] In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), this Court declined to allow the DOHSA remedy to be supplemented by a general maritime/*Moragne* recovery in order to award damages on the high seas for loss of society. Similarly, in *Off-Shore Logistics, Inc. v. Tallentire*,

The uniformity concern which informed *Miles* is most apparent in the Court's devotion to the legal history of the maritime death action, with particular attention to the rationale and objectives of the Court in *Moragne*. The *Miles* Court noted the statutory attempts to "achieve uniformity," the anomalies created by unanticipated jurisprudential developments, and the government's plea, as amicus, "to eliminate these inconsistencies and render maritime wrongful death law uniform." *Miles*, 498 U.S. at 26. The Court "described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. . . ." *id.* at 27, and specifically concluded that "*Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen." *Id.* at 30. The Court further held that, in the context of *Miles*, *Moragne* extended the DOHSA wrongful death remedy to territorial waters, *Miles*, 498 U.S. at 29, and that such extension "will further, rather than hinder, 'uniformity in the exercise of maritime jurisdiction." *Id.* at 29 (citing *Moragne*, 398 U.S. at 396 n.12).

Although this Court in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) approved the application of certain state wrongful death and survival statutes in fatal accidents occurring in coastal waters involving non-seafarers, it is wrong to assume that *Calhoun* abandons the time-honored maritime objectives of uniformity and special solicitude. To the contrary, *Calhoun* repeatedly urged that "[p]ermissible state regulation . . . must be consistent with federal maritime principles and policies," 116 S.Ct. at 626 n.13 (citing *Romero v. International Terminal Operating Co.*, 79 S.Ct. 468, 480-81 (1959)), such that "state law

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477 U.S. 207, 32 (1986), the Court rejected an attempt to award those same damages in a DOHSA action by supplementation with a state statute which would have allowed recovery for loss of society.

must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Calhoun,* 116 S.Ct. at 626 n.8 (quoting *Romero,* 79 S.Ct. at 480-81).

It is evident in *Calhoun* that this Court, while intent on protecting the existing state interests (fatal collision between jet ski and pleasure boat in Puerto Rico's coastal waters), also meant to preserve bedrock maritime principles recognized in *Southern Pacific Company v. Jensen,* 37 S.Ct. 524, 529 (1917), wherein this Court held that state law must yield if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Indeed, since the birth of the *Jensen* doctrine very early in this century, the goal of uniformity in maritime law has been a driving force. *Calhoun,* by emphasizing this principle yet again, has affirmed its continued vitality.

2. *Punitive damages under general maritime law.*

Before 1990, maritime courts widely assumed that punitive damages were available under general maritime law. This Court first recognized the recoverability of punitive damages in *The Amiable Nancy,* 16 U.S. (3 Wheat.) 546 (1818) (Story, J.), when it recounted the outrageous conduct of the officers and crew of the American privateer Amiable Nancy toward a commandeered vessel. However, it was not until 1859, in *Gallagher v. The Yankee,* 9 F.Cas. 1091 (N.D. Cal.), *aff'd,* 30 F.Cas. 781 (C.C.N.D.Cal. 1859), that an appellate court reviewed the amount of a punitive damages award in a maritime case. There, punitive damages were awarded against a ship's master who illegally transported the plaintiff against his will to the Hawaiian Islands, in compliance with a San Francisco vigilante committee's sentence of banishment.

Despite the assumed availability of maritime punitive damages, this Court has *never* affirmed an award of punitive damages in a maritime case.[16] This Court's decisions in *Moragne* and *Miles* have laid the foundation for the elimination of punitive damages in all maritime law actions.

Respondents have shown that in *Moragne* and *Miles,* this Court demanded uniformity between the general maritime law and congressional policy judgments when the two collided in territorial waters. Although *Miles* did not involve or discuss punitive damages,[17] a number of the lower federal courts have utilized the "analytical framework" of the *Miles* opinion and held punitive damages are not available in a seaman's action under DOHSA, the Jones Act, or the general maritime doctrine of unseaworthiness.[18] Other courts, also invoking the *Miles*

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[16]*See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1508 n.11 (5th Cir. 1995), *cert. den.*, 116 S.Ct. 706 (1996).

[17]This Court mentioned the term "punitive damages" only to indicate that the lower courts in the case at hand had rejected such damages on the facts. 498 U.S. at 22-23.

[18]*Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. den.*, 510 U.S. 915 (1993); *Clancy v. Mobil Oil Corp.*, 906 F. Supp. 42 (D. Mass. 1995); *Bell v. Zapata Haynie Corp.*, 855 F. Supp. 152, 153 (W.D.La. 1994) ("In *Miles* . . . the Supreme Court held that non-pecuniary damage are not recoverable under General Maritime Law or the Jones Act. Punitive damages, by their nature, are non-pecuniary."); *Ledet v. Power Offshore Servs., Inc.*, 1994 WL 150805 (E.D. La. 1994); *Guillory v. C.F. Bean Corp.*, 1994 WL 150738 (E.D. La. 1994); *Poret v. Noble Drilling Corp.*, 1994 WL 150725 (E.D. La. 1994); *Sullivan v. Crewboats, Inc.*, 1993 WL 541855 (E.D. La. 1993); *Tate v. Zapata Gulf Marine Constr.*, 1993 WL 346190 (E.D. La. 1993); *Dopson v. Wilrig (U.S.A.), Inc.*, 1993 WL 192145 (E.D. La. 1993); *Knighton v. Tidex Marine, Inc.*, 1993 WL 53005 (E.D. La. 1993); *Jackson v. Unisea, Inc.*, 824 F. Supp. 895 (D. Alaska 1992); *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621 (D.

rationale, have held that the general maritime law precludes any action for punitive damages on behalf of a seaman, whether against an employer who has wrongfully refused to provide

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Alaska 1992); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 679 (E.D. Mich. 1992); *In re Waterman Steamship Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Howard v. Atlantic Pac. Mar. Corp.*, 1992 WL 55487 (E.D. La. 1992); *Donaghey v. Ocean Drilling & Exploration Co.*, 1992 AMC 528 (E.D. La. 1991); *In Re Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Haltom v. Lykes Bros. Steamship Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *Matter of Mardoc*, 768 F. Supp. 595 (E.D. Mich. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991); *Stoufflet v. Apex Towing Co.*, 1991 WL 194759 (E.D. La. 1991); *Rowan Cos., Inc. v. Badeaux*, 1991 WL 175541 (E.D. La. 1991); *Brumfield v. Zapata Gulf Mar. Corp.*, 1991 WL 174818 (E.D.La. 1991); *Odeco, Inc. v. Cornish*, 1991 WL 160400 (E.D. La. 1991); *LeBleu v. Mud Control Equip. Corp.*, 1991 WL 110406 (E.D. La. 1991); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993); *Graves v. Businelle Towing Corp.*, 673 So. 2d 311 (La. App. 1996); *Public Adm'rs v. Frota Oceanica Brasileira, S.A.*, 635 N.Y.S. 2d 606 (N.Y. App. 1995); *Maritime Overseas Corp. v. Ellis*, 886 S.W.2d 780 (Tex. App. 1994); *Theriot v. McDermott, Inc.*, 611 So. 2d 129 (La. App. 1992), *writ den.*, 615 So. 2d 342 (La. 1993); *Sky Cruises, Ltd. v. Andersen*, 592 So. 2d 756 (Fla. App.), *cert. den.*, 506 U.S. 975 (1992).

maintenance and cure[19] or against a non-employer defendant.[20] Still other courts have relied upon *Miles* to preclude all punitive damages actions under maritime law.[21]

Brodtmann complain that the general maritime law is permeated by nonuniform rules, and therefore seeking uniformity in general maritime remedies is arbitrary. Their argument is persuasive. Although the general maritime law is nonuniform in some areas, this alone is not sufficient reason to create or perpetuate nonuniform rules of recovery in other areas of the general maritime law. Indeed, Brodtmann do not contest the proposition that uniformity remains a goal of the general

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[19]*Guevara, supra*; *Glynn v. Roy Al Boat Mgt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. den.*, 116 S. Ct. 708 (1996); *Boyd v. Cinmar of Glouster, Inc.*, 919 F.Supp. 208 (E.D. Va. 1996); *Long v. F/V Melanie*, 918 F.Supp. 323 (W.D. Wash. 1996); *Hollinger v. Kirby Tankships, Inc.*, 910 F.Supp. 571 (S.D. Ala. 1996); *Carolina Clipper, Inc. v. Axe*, 902 F.Supp. 680 (E.D. Va. 1995); *LaVoie v. Kualoa Ranch and Activity Club, Inc.*, 797 F.Supp. 827 (D. Haw. 1992); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996); *Stone v. International Mar. Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Milstead v. Diamond M Offshore, Inc.*, 663 So.2d 137 (La. App. 1995), *rev'd in part on other grounds*, 676 So.2d 89 (La. 1996); *Gray v. Texaco, Inc.*, 610 So.2d 1090 (La. App. 1992), *writs den.*, 616 So.2d 686, 687 (La. 1993).

[20]*Boykin v. Bergesen D.Y. A/S*, 822 F.Supp. 324 (E.D. Va. 1993); *Bridgett v. Odeco, Inc.*, 646 So. 2d 1249, 1253-54 (La. App. 4th Cir. 1994), *writ den.*, 651 So. 2d 840 (La. 1995).

[21]*Cochran v. A/H Battery Assocs.*, 909 F.Supp. 911 (S.D.N.Y. 1995); *Bardwell v. George G. Sharp, Inc.*, 1995 WL 517120 (E.D. La. 1995); *Frantz v. Brunswick Corp.*, 866 F.Supp. 527, 532 (S.D. Ala. 1994) (non-seafarer in territorial waters; court struck recreational boater's general maritime law punitive damages claim based upon *Miles*, and so interpreting *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993), *cert. den.*, 510 U.S. 1114 (1994)); *Earhart v. Chevron U.S.A. Inc.*, 852 F.Supp. 515 (E.D. La. 1993).

maritime law. This Court's decisions in *Gaudet* and *Alvez* arguably support Brodtmann's position, as do some lower court decisions.[22] *See, e.g., CEH v. F/V SEAFARER*, 70 F.3d 694 (1st Cir. 1995) (affirming an award of punitive damages against the owner and captain of a trawler vessel that willfully destroyed

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[22]The reported *post-Miles* decisions supporting punitive damages in territorial waters wrongful death and survival actions all pre-date *Guevara* and *Glynn*. *Powers v. Bayliner Marine Corp.*, 855 F.Supp. 199, 202 (W.D. Mich. 1994), *aff'd without treating the point*, 83 F.3d 789 (6th Cir. 1996); *Newhouse v. United States*, 844 F.Supp. 1389, 1394 (D. Nev. 1994); *In re Morehead Marine*, 844 F.Supp. 1193, 1196-97 (S.D. Ohio 1994); *Strawder v. Zapata Haynie Corp.*, 649 So. 2d 554, 561 (La. App. 1994). The *Newhouse* court confined its approval of punitive damages to "general maritime survival action[s]." 844 F. Supp. at 1394. The *Powers*, *Morehead*, and *Strawder* courts seemed not to draw a distinction between wrongful death and survival actions.

The remaining *post-Miles* non-seafarer cases favorable to punitive liability all involve property damage. Only one of these decisions even mentions *Miles*. The ones that do not mention *Miles* are *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244, 1257 (8th Cir. 1994), *cert. den.*, 115 S.Ct. 1270 (1995) (holding that respecting transactions governed by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§1300-1315, cargo interests can pursue the carrier for punitive damages when the loss or damages results from a tort that is independent of the breach of the contract of carriage); *Jones v. Compagnie Generale Maritime*, 882 F.Supp. 1079, 1083-85 (S.D. Ga. 1995) (agreeing with *Gamma-10* court that COGSA does not preclude the shipper's pursuit of punitive damages but insisting that it takes not merely an independent tort but "criminally culpable behavior" to generate such a cause of action); *Leather's Best Int'l, Inc. v. MV Lloyd Sergipe*, 760 F.Supp. 301, 313 (S.D.N.Y. 1991) (dictum to same effect as *Gamma-10*); *Hudson River Cruises, Inc. v. Bridgeport Drydock Corp.*, 892 F.Supp. 380, 386 (D. Conn. 1994) (dictum that punitive damages would lie for tortious property damage caused by drydock company engaged to repair vessel).

plaintiff's lobster traps and, in doing so, rejecting *Miles*).[23] However, neither *Gaudet, Alvez, CEH,* or similarly-reasoned lower court decisions are consistent with the clear language of *Moragne,* which states that uniformity relates to "federal policies" and that those policies receive their most potent expression in federal legislation. It is for this reason that the lower Louisiana appellate court decried *CEH* unsound.[24]

The federal policies gleaned from the maritime recovery statutes and the principles of special solicitude have encouraged the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits to acknowledge their duty to apply the rationale of *Miles* beyond its facts, just as *Miles* applied *Moragne* beyond its facts. They have applied *Miles* to personal injury and death claims;[25] to punitive

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[23]Significantly, *CEH* accepted the characterization of *Miles* as a case involving "nonpecuniary relief" and of punitive damages as a form of "nonpecuniary relief." *See CEH,* 70 F.3d 700 (stating that *Miles* "den[ied] recovery for loss of society, a form of nonpecuniary relief"); *Id.* at 701 (stating that the court could find "no basis under *Miles* for barring nonpecuniary relief here).

[24] *See Brodtmann vs. Duke, et als.*, 708 So.2d at 454.

[25]*In re Amtrack Sunset Ltd. Train Crash in Bayou Canot,* 121 F.3d 1421 (11th Cir. 1997); *Horsley, supra* (there is no right to recover loss of society in general maritime law unseaworthiness action involving non-fatal injury); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (*per curiam*) (same).

damages and loss of society damages;[26] and to nonseamen and seamen alike.[27]

The *en banc* Fifth Circuit in *Guevara, supra,* spoke directly of *Miles'* impact on the substantive content of the general maritime law. The issue before the *Guevara* court concerned an injured seaman's claim for punitive damages as a result of his employer's willful and callous refusal to pay maintenance and cure. The *Guevara* court reversed years of prior case law in the Fifth Circuit by holding that punitive damages were no longer recoverable when an employer willfully and callously refuses to pay maintenance and cure to an injured seaman.[28] *See also, Glynn v. Roy Al Boat Management Corp,* 57

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[26]*Guevara,* 59 F.3d at 1513 (unanimous *en banc* Fifth Circuit held that in light of *Miles,* "punitive damages are no longer available in cases of willful nonpayment of maintenance and cure under the general maritime law"); *Glynn,* 57 F.3d at 1512 (concluding that limiting recovery in maintenance and cure claims to non-pecuniary damages is consistent with *Miles*); *Horsley, supra* (punitive damages are unavailable in unseaworthiness claims after *Miles*); *Miller, supra* (punitive damages are not available under general maritime law).

[27]*Chan v. Society Expeditions, Inc.,* 39 F.3d 1398 (9th Cir. 1994) (dependents of injured non-seafarer have no loss of consortium claim under general maritime law), *cert. den.,* 115 S.Ct. 1314 (1995); *Preston v. Frantz,* 11 F.3d 357 (2d Cir. 1993) (survivors of non-seafarer who died in helicopter crash on the high seas could not recover punitive damages under general maritime law), *cert. den.,* 512 U.S. 1279, 115 S.Ct. 31 (1994) *Wahlstrom v. Kawasaki Heavy Industries, Ltd.,* 4 F.3d 1084, 1094 (2d Cir. 1993) (parents of non-seafarer cannot pursue punitive damages claim under general maritime law), *cert. den.,* 510 U.S. 1114 (1994)). *See also, Shield v. Bayliner Marine Corp.,* 822 D. Conn. 1993) (refusing to draw a distinction between seamen and passengers).

[28]The Fifth Circuit had previously held in *Holmes v. J. Ray McDermott & Co.,* 734 F.2d 110 (5th Cir. 1984) that an award of punitive damages under the general maritime law may be obtained when an employer

F.3d 1495, 1501-5 (9th Cir.1995) (reaching same conclusion as *Guevara* and holding, among other things, that precluding punitive damages is consistent with *Miles*).[29]

The *Guevara* court reasoned that *Miles*' call for uniformity demands that punitive damages no longer be available under the general maritime law of maintenance and cure. The *en banc* Fifth Circuit also explained that because of *Miles*, its opinion in *Dyer v. Merry Shipping Co.*, 650 So.2d 622 (5th Cir. 1981) was no longer sound and had been effectively overruled. *Merry Shipping* was the first case to provide for punitive damages under the general maritime law in the Fifth Circuit and has furnished the legal foundation for all punitive damages claims in maritime cases ever since.

Merry Shipping involved the death of a seaman and his widow's wrongful death action based upon the Jones Act and the unseaworthiness doctrine of the general maritime law. The primary issue before the Fifth Circuit concerned the availability

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willfully and callously refuses to pay maintenance and cure to an injured seaman. However, upon rehearing in *Guevara*, the court noted that significant developments in the law of admiralty since the *Holmes* decision required a rethinking of its position. *See Guevara*, 59 F.3d at 1498.

[29]A number of federal district court and state court decisions have followed the lead of *Guevara* and *Glynn*. *Boyd v. Cinmar of Gloucester, Inc.*, 919 F. Supp. 208 (E.D. Va. 1996); *Long v. F/V Melanie*, 918 F. Supp. 323 (W.D. Wash. 1996); *Hollinger v. Kirby Tankships, Inc.*, 910 F. Supp. 571 (S.D. Ala. 1996); *Carolina Clipper, Inc. v. Axe*, 902 F. Supp. 680, 684 (E.D. Va. 1995) (citing unreported decision in *Flagship Mar. Adjusters, Inc. v. Cruz Hernandez*, E.D. Va. No. 2:95cv105); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996); *Stone v. International Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Milstead v. Diamond M. Offshore, Inc.*, 663 So. 2d 137, 152 (La. App.), *rev'd in part on other grounds*, 676 So. 2d 89 (La. 1996).

of punitive damages under the federal statute and judge-made general maritime law. In answering the question affirmatively under the general maritime law, *Merry Shipping* disregarded the congressional policy judgments in the Jones Act. In fact, *Merry Shipping* passed over the Jones Act entirely, stating that "[t]he district court may well be correct that punitive damages may not be recovered in this Circuit under the Jones Act, although we need not decide the issue at this time." 650 F.2d at 626. The *Merry Shipping* holding relied upon one key proposition: "It does not follow . . . that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law." 650 F.2d at 626. *Miles*, which demands parity between federal policy judgments in the maritime statutes and recovery under the general maritime law, effectively overruled *Merry Shipping*. *Guevara*, 59 F.3d at 1507. With the death of *Merry Shipping*, the legal underpinnings of the punitive damages claims are no longer sound.

Miles and *Guevara* are consistent with the concept of full compensation. The decisions allow plaintiffs to be fully compensated by either the Jones Act or DOHSA, and do not permit the general maritime law to provide a more generous remedy than statutory analogs. What *Miles* and *Guevara* do not permit is punitive damages recovery, which would be over and above full compensation. Punitive damages are imposed to punish and deter defendants; thus, they are something separate from and additional to full compensation.[30]

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[30]As a legal term, "pecuniary damages" is used to refer to categories of losses for which compensatory damages are sought that can be measured with reasonable accuracy in terms of money; they are designed to restore "material loss which is susceptible of a pecuniary valuation." *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913)). *See also Black's Law Dictionary* 392 (6th ed. 1990). The post-*Miles* cases speak with singular unanimity in concluding that punitive damages are nonpecuniary. "Punitive damages, on

Even before *Guevara* rejected punitive damages, the Second Circuit, district courts in the Fourth, Fifth and Eleventh Circuits, and state courts in Alabama and Louisiana had all concluded that *Miles* eliminates punitive damages from the general maritime law. These judicial declarations occurred in factual settings which all involved personal injuries or deaths and included maritime products liability suits,[31] *Moragne* actions,[32] collision (or allision) cases,[33] or actions by seamen against non-employers.[34]

After *Guevara*, an ever-increasing number of district courts denied punitive damages in non-seafarer personal injury

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the other hand, do not compensate for a loss, but rather, are imposed to punish and deter by virtue of the gravity of the offense." *Anderson v. Texaco, Inc.*, 797 F.Supp. 531, 534 (E.D. La. 1992) (collecting cases). *See also Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993) (acknowledging that punitive damages are nonpecuniary), *cert. den.*, 510 U.S. 1114 (1994); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987) ("Punitive damages are non-pecuniary . . . ."); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984) ("Punitive damages are nonpecuniary."), *cert. den.*, 471 U.S. 1136 (1985). *See even Merry Shipping*, 650 F.2d at 626 (noting that its previous holding that only pecuniary damages are recoverable under the Jones Act cases doubts upon the availability of punitive damages under the Act).

[31] *Wahlstrom, supra*; *Frantz v. Brunswick Corp.*, 866 F.Supp. 527 (S.D. Ala. 1994).

[32] *Choat v. Kawasaki Motors*, 1994 AMC 2626 (Ala. 1994).

[33] *Earhart v. Chevron U.S.A. Inc.*, 852 F.Supp. 515 (E.D. La. 1993).

[34] *Boykin v. Bergesen D.Y. A/S*, 822 F.Supp. 324 (E.D. Va. 1993); *Bridgett v. Odeco, Inc.*, 646 So.2d 1249 (La. App. 4th Cir. 1994), *writ den.*, 651 So.2d 840 (La. 1994).

actions,[35] reasoning that because *Miles* means seafarers' actions cannot yield punitive damages, other maritime plaintiffs can have no more generous remedies. They have also construed *Miles* as fostering a uniform plan of maritime tort law which Congress and this Court have sought to establish. These cases also stand against punitive liability in death cases in coastal waters.

Brodtmann suggest that the federal statutes that limit recovery, namely DOHSA and the Jones Act, should have no bearing on the remedies available under the general maritime law. This argument forgets that examining analogous, if not controlling maritime statutes, was the central feature of this Court's general maritime law decisions in *Moragne* and *Miles*.[36]

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[35]*O'Hara v. Celebrity Cruises, Inc.*, 979 F.Supp. 254, 255 (S.D.N.Y. 1997) (denying punitive damages to two *non-seafarers* - cruise ship passengers - in general maritime law action against non-employer); *Frazer v. City of New York*, 659 N.Y.S.2d 23 (N.Y.Sup. 1997)(denying punitive damages to *non-seafarers* - passengers on sightseeing boat which struck a bridge - in maritime personal injury action against non-employers); *Cochran v. A/H Battery Associates*, 909 F.Supp. 911, 921-22 (S.D.N.Y. 1995) (a *non-seafarer* - passenger on a ferry which collided with a dock - cannot recover punitive damages under general maritime law against non-employers). *See also Hollinger v. Kirby Tankships, Inc.*, 910 F.Supp. 571, 573 (S.D. Ala. 1996); *Frantz v. Brunswick Corp.*, 866 F.Supp. 527, 532 (S.D. Ala. 1994) (denying punitive damages to *non-seafarer* in maritime products liability action against boat manufacturer, steering system manufacturer and seller)

[36]*See also, Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), wherein the Court declined to permit the general maritime law to supplement DOHSA and provide recovery for nonpecuniary losses like loss of society. The Court saw a "difference between filling a gap left by Congress' [sic] silence and rewriting rules that Congress has affirmatively and specifically enacted." 436 U.S. at 625. When Congress "speak[s] directly" to an issue, courts cannot undermine that judgment through the general maritime law. Id. Because DOHSA explicitly limits damages to pecuniary losses,

Nor is any court constrained from looking to analogous federal statutes and fashioning remedies consistent with those enactments to further special solicitude and uniformity.

Brodtmann also contend that adherence to uniformity runs athwart of special solicitude. In essence, Brodtmann argue that it is "unjust" to deny non-seafarers a remedy (like punitive damages) on the basis that the same remedy is not available to the *most protected class* of potential plaintiffs under maritime law (i.e., seafarers). This *reverses* the special solicitude shown to seafarers. If maritime law does not provide a remedy to those most protected by maritime law, it is hardly unjust to deny that remedy to those *less* in need of maritime law's protections. To the contrary, it would be entirely inequitable to permit a remedy to non-seafarers which is denied to seafarers. As the *Trueheart* Court stated:

> [D]istinguishing other cases on the basis of their involving seamen and seaworthiness claims in order to allow recovery here would not foster admiralty's aim of providing special solicitude to seamen. General maritime law is its most generous to seamen, the wards of admiralty. This Court refuses to find such a distinction relevant in order to craft for nonseamen's survivors a remedy not available to seamen's survivors, to whom admiralty also provide special solicitude.

Higginbotham Court held that DOHSA was the exclusive remedy for deaths occurring on the high seas. *Id.* at 622-26.

Miles complements the *Higginbotham* formula by suggesting that when courts have interpreted a remedial statute to preclude certain damages or causes of action, the general maritime law cannot supplement that statute with broader remedies.

Trueheart, 672 F.Supp. at 937; *see also, Wahlstrom,* 4 F.3d at 1092; DiBiagio, 25 U. Balt. L. R. 1, 3 (Fall 1995) ("[I]f punitive damages are no longer available in claims arising from the death or injury of a seaman, the traditional ward of maritime law, it would be incongruous to permit the recovery of punitive damages in actions arising from injury or death of a non-seaman.").

Moragne found the existing maritime recovery scheme intolerable because "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce[d] liability outside the three-mile limit . . . -- but not within territorial waters of a State whose local statute exclude[d] unseaworthiness claims." 398 U.S. at 395. The *Moragne* Court found "much force" in the argument that different in treatment based on location of the injury could not be supported by any "rational policy," especially since the underlying duty to furnish a seaworthy vessel is a federal one. 398 U.S. at 395-96. Accordingly, because of this anomaly and others, the Court in *Moragne* declined to adhere any longer to "a rule unjustified in reason, which produced different results for breaches of duty in situations that cannot be differentiated in policy." 398 U.S. at 405. Brodtmann have articulated no rational policy for permitting non-seafarers to recover punitive damages in territorial waters, while denying the same remedy to seafarers and to those killed on the high seas. Nor can they do so.

Allowing punitive damages in this *Moragne* death action would dishonor the uniformity and special solicitude objectives by injecting two major inconsistencies into the maritime wrongful death law. First, punitive damages would be available for certain deaths occurring within territorial waters, but not for deaths occurring on the high seas, thus violating the uniformity objective. Second, punitive damages would be forever beyond

the reach of the most protected maritime claimants (seafarers) but available to a lesser protected class (non-seafarers) who fortuitously die in coastal waters, thus violating the objective of special solicitude. This Court should be loathe to reintroduce such inconsistencies into maritime law.

This Court has always acknowledged the special solicitude to those who make a living on the sea. *Moragne, supra,* 398 U.S. at 387. The Court has also applied maritime precepts to non-seafarers injured or killed on or over the seas where the activity is one that would traditionally have been conducted by water craft regardless of the lack of their conscious assumption of the risks of the seas. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249 (1972); *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986). Because the Court has imposed maritime precepts on non-seafarers, it should strive to make uniform remedies. The uniformity demands of *Moragne* and *Miles* are unquestionably promoted by aligning general maritime recovery with the maritime recovery statutes to deny punitive damages liability in *Moragne* death actions arising from fatal injuries to non-seafarers in territorial waters. A contrary conclusion would turn the principles of uniformity and special solicitude on their heads.

B. Punitive damages are unwarranted.

Even assuming *arguendo* that punitive damages are available under the post-*Miles* general maritime law, applicants failed to adduce sufficient admissible evidence to establish liability for punitive damages under the general maritime standard. In order to recover punitive damages in this maritime case, the applicants were required to prove that Onan acted with intentional, willful, reckless, wanton and callous disregard of the

threat to the safety of the consumer -- i.e., in bad faith and with actual malice. *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989); *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987); *Harper v. Zapata Offshore Co.*, 741 F.2d 87 (5th Cir. 1984); *Complaint of Merry Shipping, Inc., supra.*[37] The evidence adduced at trial falls far short of this high threshold.

Brodtmann offered volumes of evidence in their attempt to prove that punitive damages are warranted. The bulk of that evidence relates to prior accidents involving other Onan MCCK generators. Even taking all inferences in Brodtmann's favor, such evidence does not support a finding of conscious or deliberate disregard of foreseeable harm. At best, it may support a claim of negligence. However, negligence alone, does not support imposition of punitive damages. *Morales, supra.*

The evidence shows that Onan has always conducted itself in a responsible manner with regards to the safety of its marine generators and their users. First, Onan designed the MCCK 6.5 in compliance with the only standards in existence at that time -- ABYC voluntary compliance standards, which approved galvanized steel as an appropriate metal. Onan's compliance with those standards precludes a rational finding of conscious disregard for consumer safety. Second, although the fact that other incidents occurred may suggest notice of a defect, it does not prove that Onan continued to sell the MCCK genset in "conscious or deliberate disregard" of the consumer's safety. The evidence proves just the contrary; it shows that Onan believed in good faith that its consumer warnings concerning the dangers of carbon monoxide and other exhaust gasses, and its

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[37]Onan's position is, and has been, that these decisions are no longer viable in light of the uniformity principles that have shaped the general maritime law.

recommendations for proper ventilation and regular inspection of generator after every eight (8) hours of operation, as well as U.S. Coast Guard recommendations for more frequent inspections, were reasonable protections for consumers. Although these warnings might not preclude substantive liability findings of product liability, they negate any inference that Onan acted with actual malice in continuing to sell the MCCK genset. In fact, Onan thoroughly investigated all claims filed against it relating to the safety of its MCCK marine generators, determined from these investigations that the galvanized steel exhaust pipe nipple was *not* defective, and reiterated its warnings relating to the proper installation, maintenance, and use of the generator. Third, applicants' brief argues that Onan failed to warn consumers of the product's dangers because in Onan's opinion, the galvanized steel exhaust pipe nipple would last as long as the other component parts of the generator. That such an opinion might have been erroneous does not amount to actual malice supporting the imposition of punitive damages.

In sum, applicants did not present evidence for the factfinder supporting an award of punitive damages.

CONCLUSION

For all of the foregoing reasons, this case does not merit further review. Accordingly, the judgment should stand and this Petition should be denied.

Respectfully submitted,

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